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ARTICLES

Modifying the Kentucky Rules of Evidence— A Separation of Powers Issue

BY ROBERT G. LAWSON*

INTRODUCTION

How do you modify laws that simultaneously exist as statutes and rules of court? For reasons that are described elsewhere[1] and need not be repeated here, the Kentucky Rules of Evidence ("K.R.E.") came into existence through concurrent enactment by the General Assembly[2] and supreme court[3] and thus are endowed with all the attributes of both statutes and rules of court. So, how do you change them when the inevitable need to do so arises, a question made both interesting and difficult by the fact that there is no institutional mechanism for

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[1] *See* Robert G. Lawson, *Interpretation of the Kentucky Rules of Evidence—What Happened to the Common Law?*, 87 KY. L.J. 517, 526-32 (1998-99).

[2] *See* Act of Apr. 9, 1992, ch. 324, 1992 Ky. Acts.

[3] *See* Order, Supreme Court of Kentucky, May 12, 1992.

concurrent lawmaking by the General Assembly and supreme court, at least not in Kentucky.[4]

Drafters of the Rules encountered uncertainty and conflict over where the authority to create evidence law rests[5] and similar though lesser uncertainty and conflict over where the authority to amend the Rules should rest.[6] They resolved the former by having the Rules concurrently

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[4] An established system for concurrent lawmaking exists in the federal system for all so-called rules of court (civil, criminal and evidence rules). The United States Supreme Court formulates rules (or amendments to rules) and transmits them to Congress for review, whereupon they become effective unless Congress takes action to reject or modify the transmissions. *See* 28 U.S.C. § 2072 (1990); 28 U.S.C. § 2074 (1988).

[5] Uncertainty and conflict over this issue has long been a major problem for law reformers. Serious conversations about adoption of evidence rules for the federal courts began in the 1930s, as part of the effort that produced the Federal Rules of Civil Procedure. *See* Ronan Degnan, *The Law of Federal Evidence Reform*, 76 HARV L. REV 275 (1962). Conflict over whether rulemaking in this area is a legislative or judicial function stifled these early efforts and suppressed evidence law reform for more than three decades. Renewed efforts in the 1960s produced a set of proposed evidence rules for federal courts but no end to the uncertainty over whether the authority to act rested with the legislature or the judiciary. The Supreme Court adopted the proposals as rules of court and submitted them to Congress as required by its statutory rulemaking authority, expecting Congress to approve through inaction as it had done routinely with other exercises of this authority. *See* 28 U.S.C. § 2072 (1990). Instead, Congress rejected the Court's submission. *See* Act of Mar. 30, 1973, Pub. L. No. 93-12, 8 Stat. 9 (1973). It subjected the proposals to full legislative review, enacted them into law, and produced an evidence code that exists as statutes of Congress rather than as rules of court. *See* H.R. CONF REP. No. 93-1597 at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7098. Uncertainty and conflict over the authority issue has also slowed and hampered reform efforts at the state level. *See, e.g.*, Paul C. Gianelli, *The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking*, 29 CASE W RES. L. REV 16 (1978).

[6] At the core of this uncertainty and conflict was concern by the Kentucky Supreme Court about legislative infringement upon its constitutional rulemaking power, the source of which was an original proposal that left the General Assembly with statutory authority to disapprove of amendments or additions to the Rules prescribed by the court. *See* EVIDENCE RULES STUDY COMM., KENTUCKY RULES OF EVIDENCE 115 (Final Draft 1989) [hereinafter STUDY COMM.]. Justice Charles Leibson took the lead in expressing the court's position: "I am concerned about requiring the Supreme Court to get legislative approval for amending, changing or modifying the rules." Letter from Charles Leibson, Supreme Court Justice, to Robert G. Lawson (Dec. 14, 1990) (on file with author). The court subsequently

enacted and the latter by incorporating into the Rules a very complex amendment provision:

> (a) Supreme Court. The Supreme Court of Kentucky shall have the power to prescribe amendments or additions to the Kentucky Rules of Evidence. Amendments or additions shall not take effect until they have been reported to the Kentucky General Assembly by the Chief Justice of the Supreme Court at or after the beginning of a regular session of the General Assembly but not later than the first day of March, and until the adjournment of that regular session of the General Assembly; but if the General Assembly within that time shall by resolution disapprove any amendment or addition so reported it shall not take effect. The effective date of any amendment or addition so reported may be deferred by the General Assembly to a later date or until approved by the General Assembly. However, the General Assembly may not disapprove any amendment or addition or defer the effective date of any amendment or addition that constitutes rules of practice and procedure under Section 116 of the Kentucky Constitution.
>
> (b) General Assembly. The General Assembly may amend any proposal reported by the Supreme Court pursuant to subdivision (a) of this rule and may adopt amendments or additions to the Kentucky Rules of Evidence not reported to the General Assembly by the Supreme Court. However, the General Assembly may not amend any proposals reported by the Supreme Court and may not adopt amendments or additions to the Kentucky Rules of Evidence that constitute rules of practice and procedure under Section 116 of the Constitution of Kentucky.
>
> (c) Review of Proposals for Change. Neither the Supreme Court nor the General Assembly should undertake to amend or add to the Kentucky Rules of Evidence without first obtaining a review of proposed amendments or additions from the Evidence Rules Review Commission described in Rule 1103.[7]

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proposed changes in the amendment provisions of the Rules. *See* Letter from Robert F Stephens, Chief Justice, to Robert G. Lawson (Sept. 6, 1999) (on file with author). Drafters of the Rules suggested different modifications of the original proposals, expressing an opinion that the court's proposals would not provide "a workable approach to amending the rules" and assuring the court that its authority over practice and procedure would "remain fully intact." Letter from Robert G. Lawson to Robert F Stephens, Chief Justice (Dec. 4, 1991) (on file with author). The court concurred with the new proposals of the Study Committee, and the amendment provisions of the Rules took their final form. *See* Letter from Robert F Stephens, Chief Justice, to Robert G. Lawson (Dec. 17, 1991) (on file with author).

[7] KY. R. EVID. [hereinafter K.R.E.] 1102.

This provision—Rule 1102—may appear at first glance to embrace for amendment purposes the approach that was used to enact the Rules, i.e., concurrence in modifications of the Rules by both the supreme court and General Assembly, and it does in fact replicate aspects of the enactment approach. It is in truth a more complex provision than it appears to be, mostly because of complications generated by the constitutional separation of powers between the legislative and judicial branches of government.

Major problems involving amendment of the Rules have not yet surfaced. There has been no substantial modification of the Rules since their enactment, although some is needed, and no resolution of fundamental questions concerning amendment by the supreme court. There have been some peripheral observations in the case law about the amendment provisions of the Rules but no major consideration of the important ramifications of Rule 1102, although crucial issues concerning amendment loom large on the horizon.[8] It is the purpose of this Article to identify and discuss these issues and shed some needed light on the amendment provisions of the Rules, all with an eye on the fundamental question of whether the creation of evidence law is a legislative or judicial function.

Part I sets the stage for subsequent discussion by describing the basics of amendment under Rule 1102, what the Kentucky Supreme Court has said on the subject to date, and the issues that need attention and analysis. Part II examines the fundamentals of judicial rulemaking generally and under Kentucky law Part III discusses the meaning of "substance" and "procedure," concepts that are used in Kentucky and elsewhere to define the rulemaking authority of the judiciary, with special attention given to the Federal Rules Enabling Act—the richest source of guidance on the subject—and to the commentary of legal scholars on general rulemaking authorities. Part IV extends the substance/procedure analysis to evidence law and attempts a classification of the Kentucky Rules of Evidence as "substance" and "procedure" for rulemaking (and amendment) purposes.

I. SETTING THE STAGE

A. Rule 1102

In examining the content of Rule 1102, it helps to know that the drafters of Kentucky's Rules looked favorably upon the approach that

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[8] *See, e.g.*, Stringer v. Commonwealth, 956 S.W.2d 883 (Ky 1997); Mullins v. Commonwealth, 956 S.W.2d 210 (Ky. 1997); Weaver v. Commonwealth, 955 S.W.2d 722 (Ky. 1997).

had been used effectively for two decades to amend the Federal Rules.[9] Under the federal approach, amendments are formulated by the Supreme Court, transmitted to Congress for review, and rendered effective on a fixed date unless Congress takes action to reject or alter the submissions.[10] It also helps to be reminded that drafters of Kentucky's Rules would have known that the supreme court is far more likely than the General Assembly to discover flaws in evidence rules and considerably more capable of formulating modifications to fix those flaws, conclusions reinforced by the federal system's approach to the amendment process.[11]

With these things in mind, it is easy to see that the approach adopted by Rule 1102 has four principal components: (1) a plenary power in the supreme court to prescribe amendments or additions to the Rules,[12] (2) an obligation on the court to report its actions to the General Assembly,[13] (3) limited General Assembly authority to disapprove or modify supreme court actions or to prescribe its own amendments or additions, and (4) strong encouragement for both rulemaking bodies to rely upon the Evidence Rules Review Commission before finalizing changes in the Rules.[14]

The supreme court clearly occupies the dominant position with respect to amendment of the Rules. It has the power to prescribe amendments and additions without restriction, and it has the ability to control and influence

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[9] *See* Letter from Robert G. Lawson to Robert F Stephens, Chief Justice (Sept. 16, 1991) (on file with author).

[10] *See* 28 U.S.C. §§ 2072, 2074.

[11] Most modern authorities concede that Congress has the constitutional power to prescribe rules of practice and procedure for federal courts. *See, e.g.*, Edward W Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV 908, 910 (1978). Congress's delegation of this power to the Supreme Court reflects the clearest possible recognition of the superior ability of the judiciary to deal with matters of practice and procedure, including the law of evidence.

[12] This power is plenary in the sense that it requires no consideration of the distinction between "procedure" and "substance" that is brought into play by the Rule's use of Section 116 of the Constitution to define the roles of the supreme court and General Assembly in amendment of the Rules.

[13] As under the federal model, amendments prescribed by the court do not become effective until they have been reported to the General Assembly under the terms of Rule 1102 and until the General Assembly adjourns the session in which such report is received.

[14] The Evidence Rules Review Commission is a purely advisory body that is designed to function like the advisory committees on rules of procedure in the federal system.

the Evidence Rules Review Commission.[15] Its unrestricted power to prescribe modifications to the Rules is grounded partly in its constitutional authority to adopt "rules of practice and procedure for the Court of Justice"[16] and partly in a delegation of authority from the General Assembly somewhat similar to Congress's delegation of authority to the United States Supreme Court under the federal Rules Enabling Act.[17] While delegating this authority to the court, Rule 1102 leaves the General Assembly with authority to act independently to define and/or redefine rules of evidence that fall on the "substance" side of the constitutional dichotomy between "substance" and "procedure." In its use of this dichotomy to define the General Assembly's amendment authority, the provision says nothing about where "procedure" ends and "substance" begins in the law of evidence, choosing instead to leave this issue for case-by-case determinations as the need arises. That this need will arise sooner rather than later is guaranteed, for the General Assembly has already acted on its own to modify certain provisions of the Rules, as described below

B. The Court's View

The supreme court has expressed some views on the meaning of Rule 1102 but has stopped far short of rendering landmark decisions on amendment of the Rules. Its first significant consideration of the provision occurred in *Weaver v. Commonwealth*,[18] one of two cases in which the court encountered situations supporting arguments that the Rules had been unilaterally amended by an exercise of judicial power. In trying to defend against drug charges, the defendant in *Weaver* was hampered by lower court application of a privilege that had been *judicially created* after adoption of the Evidence Rules.[19] The supreme court struck the privilege

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[15] The membership of the Commission is the chief justice, one additional judge, the chairs of the House and Senate Judiciary Committees, and five members of the bar. The chief justice appoints six of the eight members (all but the legislative representatives) and has sole authority to call the body into session. *See* K.R.E. 1103.

[16] KY. CONST. § 116.

[17] *See* 28 U.S.C. § 2072 (1990) (the Rules Enabling Act); *infra* Part III. In this delegation of authority, Congress distinguished between "procedure" and "substance" and limited the rulemaking authority of the Supreme Court to matters of procedure.

[18] Weaver v. Commonwealth, 955 S.W.2d 722 (Ky. 1997).

[19] The defendant was precluded from engaging in certain cross-examination of a police officer about an inaudible tape recording of the drug transaction that

down as improperly created[20] and in its opinion made the following statement about amendment of the Rules:

> The proper procedure for amending or adding to the Kentucky Rules of Evidence is established in KRE 1102 and 1103. *These procedures do not include amendments or additions created unilaterally by either the General Assembly or the Supreme Court.* More specifically, the rules do not permit the amendment or addition of any new rules of evidence by any court of this Commonwealth except the Supreme Court. [21]

In this initial impression of the amendment process, the court sees that portion of Rule 1102 that facilitates a cooperative/concurrent amendment of the Rules—initiated by the supreme court, transmitted to the General Assembly for review, and approved through action or inaction of the General Assembly It appears not to see aspects of the Rule that were designed to account for the likelihood, if not certainty, that the two lawmaking bodies would sooner or later act independently of each other in the creation of evidence doctrine, for it goes too far in suggesting that Rule 1102 leaves no room for unilateral amendment of the Rules.[22]

A second case in which the amendment provisions of the Rules came under scrutiny was *Stringer v. Commonwealth*,[23] a case in which the

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resulted in his indictment. "The trial judge sustained the objection to this inquiry on the basis of the so-called 'police surveillance privilege' recognized by the Court of Appeals in *Jett v. Commonwealth,* 862 S.W.2d 908, 910 (Ky. Ct. App. 1993). Prior to *Jett*, the surveillance privilege had never been recognized by our courts; nor is it found in Article V of the Kentucky Rules of Evidence." *Weaver*, 955 S.W.2d at 727

[20] "If a 'police surveillance privilege' is to be adopted in this Commonwealth, it must be adopted in accordance with the procedures established in KRE 1102 and 1103." *Weaver*, 955 S.W.2d at 727

[21] *Id.* (emphasis added).

[22] Subsection (b) of Rule 1102 clearly authorizes the General Assembly to act on its own to adopt amendments or additions to the Rules, provided that it may not so act with respect to parts of the Rules that constitutes "practice and procedure" under Section 116 of the Constitution. Subsection (a) of the provision authorizes the supreme court to prescribe amendments or additions to the Rules and fixes a process by which it must act to do so (submission to the General Assembly, etc.). The Rule says nothing one way or another concerning the power of the supreme court to create evidence law outside the confines of the Rules, a complex issue that the author has addressed in an earlier article on the Rules. *See* Lawson, *supra* note 1, at 567-75.

[23] Stringer v. Commonwealth, 956 S.W.2d 883 (Ky. 1997).

supreme court had to decide if an expert witness can express an opinion on an ultimate fact.[24] The following circumstances weighed heavily in the consideration of the issue and provided the fodder for controversy over amendment of the Rules:

> Before the adoption of the Rules of Evidence, Kentucky's common law included a general prohibition against expert opinion on the ultimate facts of a case. Drafters of the Rules recommended abandoning this prohibition in favor of the language found in Federal Rule 704, which provides that expert testimony "is not objectional because it embraces an ultimate issue to be decided by the trier of fact." The recommendation was enacted by the General Assembly in 1990, but was deleted from the Rules before their final approval in 1992, clearly because of resistance by the supreme court. As enacted, the Rules were simply silent with respect to expert opinion on ultimate facts.[25]

The court abandoned the position that had prevailed both before and after the enactment of the Rules and held that experts may testify to opinions on ultimate facts, believing that this modification of the law could occur without offense to the amendment provisions of the Rules.[26] Two justices disagreed and strongly protested, arguing that under the guise of interpretation the majority had ignored and violated the requirement that amendments occur under joint action of the General Assembly and supreme court. "Sadly, and despite its protest to the contrary, the majority in this case has amended the Rules of Evidence by adoption of Rule 704, contrary to the express provisions of KRE 1102 and 1103."[27]

Not much can be made about amendment from the *Stringer* holding since the majority said that it reached its decision by construing existing provisions of the Rules.[28] The dissenters adhere to the *Weaver* view that the

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[24] Specifically, the court had to decide in a child sexual abuse case if it was proper for a physician who had examined the child to testify that the physical findings of the examination were consistent with the events alleged by the child.

[25] Lawson, *supra* note 1, at 519-20.

[26] "Our departure from the 'ultimate issue' rule does not contravene KRE 1102 and 1103." *Stringer*, 956 S.W.2d at 891.

[27] *Id.* at 896 (Lambert, J., concurring). *See also id.* at 897 (Stumbo, J., dissenting) ("In direct violation of KRE 1102, the majority's opinion does precisely what this Court refused to do when we rejected proposed KRE 704.").

[28] "Our failure to adopt proposed KRE 704 simply left the 'ultimate issue' unaddressed in the Kentucky Rules of Evidence and, therefore, subject to common law interpretation by proper application of the rules pertaining to relevancy, KRE

Rules do not permit unilateral amendments and, more importantly, imply that the supreme court retains no authority to create evidence law outside the confines of the Rules, i.e., through decision making rather than formal amendment of the Rules. Rule 1102 contains some language suggesting that judicial expansion of evidence law must occur under the Rules[29] but clearly contains no explicit support of the dissenters' position. Commentators have vehemently disagreed over whether courts retain a common law power to create evidence law after the adoption of comprehensive evidence rules.[30] The controversy in *Stringer* leaves no doubt that amendment questions under Rule 1102 are related to the more fundamental issue of whether a common law power to create evidence doctrine survived adoption of the Rules.

The most interesting decision rendered so far on the amendment provisions of the Rules is *Mullins v. Commonwealth.*[31] The defendant in this case was convicted of child sexual abuse after testimony by his wife was admitted into evidence over his objection under the spousal privilege provision of the Evidence Rules. The trial court ruled the evidence admissible by finding waiver of the spousal privilege, but the important ruling was a holding by the Kentucky Court of Appeals that a statute declaring the spousal privilege inapplicable in prosecutions for child abuse prevailed over the spousal privilege provision of the Evidence Rules.[32] Upon discretionary review in the supreme court, the defendant argued that this statute, as interpreted by the court of appeals, violated both the

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401, and expert testimony, KRE 702." *Id.* at 891-92.

[29] In subsection (a), the provision authorizes the supreme court to prescribe amendments or *additions* to the Rules, perhaps thereby suggesting that judicial expansion of evidence law must occur through amendment of the Rules.

[30] Some argue that the Rules preempt the field in order to achieve "a truly codified body of Evidence Law." Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV 267, 293 (1993). Others counter that the adoption of Rules does not eliminate the need for growth in the law through "the development of novel evidentiary doctrines preserved in case law precedent." Glen Weissenberger, *Are the Federal Rules of Evidence a Statute?*, 55 OHIO ST. L.J. 393, 398 (1994).

[31] Mullins v. Commonwealth, 956 S.W.2d 210 (Ky. 1997).

[32] The statute in question provides that the husband/wife privilege may not be used "for excluding evidence regarding a dependent, neglected, or abused child." KY. REV STAT. ANN. [hereinafter K.R.S.] § 620.050(2) (Michie 1996). The privileges provision of the Evidence Rules, K.R.E. 504, gives a party the right "to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage."

amendment provision of the Evidence Rules (Rule 1102) and the constitutional rulemaking power of the supreme court (Section 116).[33]

The defendant's argument under Rule 1102 was problematical to say the least. The statute in question had been enacted in 1986, four years before the adoption of the Evidence Rules and Rule 1102.[34] The defendant apparently tried to skirt around this crucial fact by arguing that the appeals court's mere use of the statute served in some sort of mysterious manner to amend the privilege provision of the Rules in violation of the terms of Rule 1102. The supreme court disagreed, sustained the validity of the challenged statute, and affirmed the conviction:

> Here, this Court and the Court of Appeals are interpreting the application of a statute of the General Assembly. The Court of Appeals properly interpreted a statute that was enacted for a separate and distinct purpose from KRE 504. We find no constitutional or procedural fault with the legislation. The interpretation of the statute by a Court does not revise KRE 504 in any way. There is no violation of the amendment procedure provided by KRE 1102.[35]

The court made almost nothing of the fact that the statute predated the adoption of the Rules. It did say that "[t]he statute is not an amendment or addition to the rules of evidence"[36] but never once indicated that this was because the statute was in existence when the Rules were adopted.[37] By slighting this crucial fact, the court gave the defendant's Rule 1102 argument more credence than it deserved and the amendment provision of the Rules more attention than it needed. It could have resolved this first argument by simply noting that a statute cannot possibly amend a privilege rule not in existence at the time of the statute's enactment.

What makes *Mullins* interesting, and potentially very important as an amendment case, is what the court said and implied about the separation of governmental powers and judicial rulemaking. After disposing of the defendant's unusual argument under Rule 1102, the court turned its attention to the defendant's more substantial argument that the statute

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[33] *See Mullins*, 956 S.W.2d at 211.

[34] *See* Act of Apr. 10, 1986, ch. 423, 1986 Ky. Acts 66.

[35] *Mullins*, 956 S.W.2d at 211-12.

[36] *Id.* at 211.

[37] In fact, one can carefully read the opinion in *Mullins* without ever realizing that the statute under consideration had been enacted well before the Evidence Rules came into existence.

under consideration had been enacted in violation of the constitutional rulemaking authority of the court. In describing this argument as unconvincing, the court acknowledged that its rulemaking authority in the evidence area is sometimes subordinate to the lawmaking authority of the General Assembly· "The General Assembly may legislate in order to protect children, and it may determine that children's rights are paramount when there is a conflict with the privilege of an adult to exclude evidence regarding the abuse, dependency or neglect of a child."[38] Its concession is acknowledgment that parts of the law of evidence constitute "substance" rather than "practice and procedure," for no such concession could be made if the General Assembly's action had intruded upon the court's exclusive constitutional authority over practice and procedure. It is in this regard that *Mullins* could be an important case, for the same concession and same constitutional separation of powers is used in Rule 1102 to define the independent authority of the General Assembly to modify the Evidence Rules, although the supreme court has yet to recognize the existence of that independent authority

More is unsettled than settled about the supreme court's views on amendment of the Rules. Important questions have emerged from its peripheral considerations of Rule 1102, but the court has yet to engage in a careful analysis of the particulars of that provision. Its best opportunity to do so surfaced in *Mullins* but was properly deferred when it became clear that the legislation in that case did not qualify as "an amendment or addition to the rules of evidence."[39] Renewed opportunity of like kind is merely a matter of time, for the General Assembly has now unmistakably and repeatedly acted on its own to amend the Evidence Rules, as described in the next part of the discussion.

C. *Legislative Amendments*

The General Assembly had acted on its own to create evidence doctrine by the time *Weaver* arrived in the supreme court. The court noted these developments in its opinion and perhaps fired a subtle shot across the bow of the General Assembly,[40] although like the legislation in *Mullins*, this too

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[38] *Mullins*, 956 S.W.2d at 212.

[39] *Id.* at 211.

[40] "These procedures [from K.R.E. 1102 and 1103] do not include amendments or additions created unilaterally by either the General Assembly or the Supreme Court (although *we are aware* that the General Assembly has enacted post-1992 statutes which *purport* to create new privileges, *e.g.*, KRS 325.431, KRS

operated only coincidentally to modify the Rules of Evidence.[41] More recently, the General Assembly has aimed its actions directly at the Rules, eliminating all doubt that it has enacted amendments or additions without the concurrence of the supreme court.

It would be an understatement to say that the General Assembly has totally overhauled the counselor-client privilege contained in Rule 506. As originally enacted, this privilege was narrowly drawn and carefully defined, reflecting a judgment by its drafters "that a sweeping counseling privilege could result in the suppression of credible relevant evidence in many cases."[42] Its protection covered only four kinds of counselors—school, sexual assault, drug abuse, and alcohol abuse, all of which had been formalized by recognition in the Kentucky Revised Statutes. As it now exists, the privilege is essentially what the Rules' drafters feared and tried to avoid—a sweeping counseling privilege that is neither narrowly drawn nor carefully defined.[43]

The General Assembly has kept the privilege intact for those counselors who were covered by the original provision.[44] It has extended protection to professional art therapists,[45] professional marriage and family therapists,[46]

224.01.040)." *Weaver*, 955 S.W.2d at 727 (emphasis added).

[41] The court cited K.R.S. § 325.431, which creates an evidentiary privilege for proceedings of an accountancy quality review committee, and K.R.S. § 224.01-040, which creates an evidentiary privilege for environmental audit reports.

[42] STUDY COMM., *supra* note 6, at 47

[43] *See* K.R.E. 506.

[44] School and sexual assault counselors continue to be covered explicitly as before. Drug and alcohol abuse counselors are not explicitly covered in the current provision but clearly fall within new and additional categories brought under the protection of the privilege. *See id.*

[45] The Rule attempts to define art therapist by incorporation of statutes dealing with that subject. The problem is that the incorporated statutes define the person as one who is educated in art therapy and obtains board certification as such. *See* K.R.S. § 309.130(2). There is a subchapter on the subject but no indication in any of its provisions of the kind of counseling activities done by art therapists. *See id.* §§ 309.130-.138.

[46] The Kentucky Revised Statutes define this type of therapist as "a person who has completed a master's or doctoral degree program in marriage and family therapy, or an equivalent course of study, from an accredited educational institution and who is certified by the board [Board of Certification of Marriage and Family Therapists]." *Id.* § 335.300(2). Although perhaps easier to define than the art therapy privilege, the privilege for marriage and family therapy is substantially more worrisome because of the high likelihood that it will impair access to needed evidence in a variety of situations.

victims advocates,[47] and others.[48] More significantly, it has extended the protection of the privilege to any and all persons who obtain certification as "professional counselors," without restriction as to the nature or subject matter of their counseling activities.[49] Most recently, the privilege was extended to confidential communications to persons engaged in "fee-based pastoral counseling,"[50] an amendment that could easily cause one to wonder what has happened to the "fundamental principle that 'the public has a right to every man's evidence.'"[51]

The General Assembly has also acted on its own to modify the psychotherapist-patient privilege of Rule 507 It has expanded the circumstances under which the privilege can be claimed by clinical social workers.[52] More significantly, it has expanded the privilege to include

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[47] A "victim advocate" is someone who works (or volunteers) for a public or private agency, organization, or official in counseling and assisting certain types of crime victims. *See id.* §§ 421.570 and 421.500. Drafters of the original provision concluded that the privilege should be limited to persons counseling sexual assault in a rape crisis center. The amended provision is much, much broader in its coverage and is thus much more likely to come into conflict with demands for relevant evidence in the trial of important cases.

[48] The amended privilege specifically covers persons who provide "crisis response services as a member of the community crisis response team." K.R.E. 506(a)(1)(F). There is a statutory subchapter on community crisis response efforts but nothing in its provisions to suggest what types of counseling might be covered by the privilege. *See* K.R.S. §§ 36.250-.270.

[49] A professional counselor is "a person who has completed a master's or doctoral degree in counseling from an accredited educational institution, and is certified by the [Kentucky Board of Certification for Professional Counselors]." K.R.S. § 335.500(2).

[50] In the legislation creating this privilege, the General Assembly recognized for the first time a group called "fee-based pastoral counselors" and created a certification board carrying the same name, a pattern fitting most of the earlier amendments. *See id.* §§ 335.600-.699. It defines the counseling as "integrating spiritual resources with insights from the behavioral sciences, in exchange for a fee or other compensation." *Id.* § 335.605(3). The General Assembly said that its purpose was to protect the public safety and welfare by providing for regulation of such counselors. *See id.* § 335.600. How giving them a privilege against testifying in court furthers this purpose is not obvious.

[51] Trammel v. United States, 445 U.S. 48, 50 (1980) (quoting United States v Bryan, 339 U.S. 323, 331 (1950)).

[52] The original provision included clinical social workers in its definition of "psychotherapist" but only if they were: (1) licensed and (2) certified for the independent practice of clinical social work. *See* Act of Apr. 9, 1992, ch. 324, § 12,

within its protection nurses and nurse practitioners who practice psychiatric or mental health nursing,[53] an expansion that appears like most of the others to have been adopted without much concern for potential loss of relevant evidence.

The General Assembly has not yet moved beyond the privileges area in acting on its own to amend the Rules. It has historically had a much broader interest in evidence rules[54] and little concern about the possibility of intruding upon constitutionally protected territory of the supreme court. Thus, it is only a matter of time until it moves against other provisions of the Rules and/or expands evidence doctrine through additional legislative actions outside the Rules. If not yet done, it will push to the outer limits of its authority and force the court to resolve the question of what it can and cannot do on its own to amend the Rules.

D. Conclusion

There is no doubt that Rule 1102 leaves the General Assembly with limited authority to act on its own to amend the Rules (and to disapprove amendments made by the supreme court).[55] It defines this authority much like the Tenth Amendment defines the authority of states ("powers not delegated to the United States are reserved to the States"),[56] by reserving to the General Assembly what is left over from the constitutional delegation to the supreme court of the authority to adopt rules of "practice and procedure" for Kentucky's courts. Consequently, one can determine the reach of the reserved authority only by determining the reach of the

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1992 Ky. Acts. The amended provision includes clinical social workers who are licensed, an amendment that expands a privilege whose justification is marginal at best. *See* K.R.E. 507

[53] *See* K.R.E. 507(a)(2)(D).

[54] These interests are revealed by the statutes that existed before the adoption of the Rules. *See* Act of Mar. 19, 1990, ch. 88, §§ 77-91, 1990 Ky. Acts. Among laws that had to be repealed or modified were statutes on "dead men," former testimony, order of testimony at trial, judicial notice, competency of witnesses, prior acts of rape victims, business and public records, and others that are now covered in provisions of the Rules.

[55] The supreme court has not embraced this view of the provision but it has not reviewed a single case in which careful analysis of the language of Rule 1102 was crucial to its decision. The language of the Rule is clear in this regard and the supreme court will easily recognize that when the question is more specifically framed for its consideration.

[56] U.S. CONST. amend. X.

delegated authority, a very difficult task that is the primary objective of this Article and that begins with some consideration of the fundamental aspects of judicial rulemaking.

II. JUDICIAL RULEMAKING

A. *History*

One finds in English history a custom or tradition of judicial rulemaking, but not one that excluded Parliament from the arena.[57] The United States Constitution was adopted without a provision on judicial rulemaking but the Supreme Court "at an early date by rule of court considered that it had the power to regulate its own procedure."[58] Its position was later defended by Roscoe Pound and other legal heavyweights: "Hence, if anything was received from England as a part of our institutions, it was that the making of these general rules of practice was a judicial function. Indeed, this was well understood in the beginning of American law."[59] Without constitutional recognition, it was argued, rulemaking "is so judicial in essence that its grant must be implied from the very grant of 'the judicial Power' to the Court."[60] Early legislators may have disagreed, for the very first Congress saw fit to announce *legislatively* that the federal courts would have the power to make "rules for the orderly conducting [of] business in the said courts."[61]

Judicial rulemaking, whatever its source, dominated the scene for most of our country's first century, although state and federal courts alike relied

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[57] "The history of English practice thus reveals a pattern of shared judicial-legislative regulation of practice and procedure. Under this pattern, the primary rulemaking initiative rested with the judiciary, subject to the superior general power of Parliament to control procedure as it saw fit." Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV 41, 49 (1988); *see also* Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599 (1926); Charles Anthony Riedl, *To What Extent May Courts Under the Rule-making Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 601 (1940).

[58] Riedl, *supra* note 57, at 601.

[59] Pound, *supra* note 57, at 601. *See also* John H. Wigmore, *All Legislative Rules for the Judiciary are Void Constitutionally*, 23 ILL. L. REV 276 (1928), *reprinted in* 20 J. AM. JUDICATURE SOC'Y 159 (1936), as *Legislature Has No Power in Procedural Field.*

[60] Comment, *Rules of Evidence and the Federal Practice: Limits on the Supreme Court's Rulemaking Power*, 1974 ARIZ. ST. L.J. 77, 82.

[61] Act of Sept. 24, 1789, ch. 20, § 17(b), 1 Stat. 73.

heavily on the English system for their rules of practice and procedure. The courts-created system was earmarked by common law writs, forms of actions, fact pleadings, and separate courts of law and equity, a system that was soundly criticized as "cumbrous, dilatory, expensive, [and] ultra-formal."[62] Judges and lawyers resisted change, even after shortcomings became apparent,[63] and the early rulemaking authority of the judiciary was sparingly exercised in pursuit of procedural reform, an almost irresistible invitation to aggressive legislative intervention.

The New York legislature acted in 1848 to reform an outdated procedural system, enacted the famous Field Code, and initiated an era of procedural reform dominated by legislative enactments rather than rules of court. A majority of states enacted procedure codes within three decades[64] and the legislative branch had clearly gained prominence over court procedures by the end of the century Some viewed the movement as "revolutionary"[65] while others credited it for abolishing an obsolete and inefficient adjudicatory system;[66] it has been viewed as both an abdication of power by courts and a usurpation of power by legislatures[67] but always as one of the most prominent legal events of the nineteenth century Pound used the word "misfortune" to describe the court's relinquishment of control over its procedures.[68] He insisted that "procedure belongs to the courts rather than to the legislature,"[69] but conceded that it would be difficult "to pronounce such legislative interference to be unconstitutional."[70]

In the early part of the twentieth century, as enthusiasm for code procedures waned and demands for additional reforms surfaced, debate was

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[62] Pound, *supra* note 57, at 599.

[63] *See* Charles W Grau, *Who Rules the Courts?· The Issue of Access to the Rulemaking Process*, 62 JUDICATURE 428 (1979). *See also* Pound, *supra* note 57, at 599-600.

[64] *See* Riedl, *supra* note 57, at 601.

[65] Maynard E. Pirsig & Randall M. Tietjen, *Court Procedure and the Separation of Powers in Minnesota*, 15 WM. MITCHELL L. REV 141, 149 (1989).

[66] "It was the state legislatures, not the courts, that abolished the 'awkward and cumbersome common law pleadings.'" Grau, *supra* note 63, at 429.

[67] "Rule by legislation resulted either because the courts abdicated whatever power they had to promulgate their own rules or because the legislative branch usurped the power regardless of the court's attitude in the matter." Riedl, *supra* note 57, at 601.

[68] *See* Pound, *supra* note 57, at 601.

[69] *Id.*

[70] *Id.*

reignited over whether rulemaking for the courts should rest with the judiciary or the legislature. Pound argued that "[t]he legislature ought to leave judicial procedure to the judiciary,"[71] and Wigmore wrote that legislative regulation of court procedures crossed the constitutional divide and encroached upon the province of the judiciary [72] Not everyone agreed and an intense battle for control over procedures ensued, most prominently when efforts were made to reform the practice and procedure of federal courts.[73] The end results were the federal Rules Enabling Act, the Federal Rules of Civil Procedure, and the beginning of the modern era of judicial rulemaking, all of which are reserved for subsequent discussion in this Section.

B. Pros and Cons

Debate has been raging for nearly a century over whether court rules should be made by courts or legislatures, without a clear-cut resolution. The strongest argument for judicial rulemaking is that courts are better than legislators at making rules of practice and procedure. Judges are educated in the intricacies of the subject and are positioned to observe injustices that might be attributable to flawed procedures. There is no room to doubt that the advantage in expertise rests with the judiciary· "Court rules are the work of an agency whose whole business is court business an agency keenly aware of the latest problems and fully capable of bringing to bear in their early solution a long and solid experience."[74] Some argue that court business is adjudication not rulemaking, that the latter differs from the former in both process and impact, and that even in the hands of judges "rulemaking is a legislative process."[75] Hardly anyone would counter that courts are as good at rulemaking as they are at adjudication, especially when it comes to "drastic wholesale procedural reform."[76] But, once we remember that rulemaking mostly involves "minor alterations of single

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[71] *Id.* at 601-02.

[72] *See* Wigmore, *supra* note 59, at 276.

[73] *See, e.g.*, Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV 1015 (1982); Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS. 144, 145-48 (1948).

[74] Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem of Constitutional Revision*, 107 U. PA. L. REV 1, 11 (1958).

[75] Grau, *supra* note 63, at 428.

[76] Levin & Amsterdam, *supra* note 74, at 11.

rules from time to time as experience dictates,"[77] there is again little room to doubt that courts are better equipped than legislatures to fix the problems.

It is also argued that courts are more likely to be interested in fixing the problems than legislatures. What Pound said on this subject more than seventy-five years ago probably rings even truer today:

> Legislatures today are so busy, the pressure of work is so heavy, the demands of legislation in matters of state finance, of economic and social legislation, and of provision for the needs of a new urban and industrial society are so multifarious, that it is idle to expect legislatures to take a real interest in anything so remote from newspaper interest, so technical, and so recondite as legal procedure.[78]

History clearly supports the complaint that in dealing with matters of practice and procedure "legislatures are intolerably slow to act and cause even the slightest and most obviously necessary matter of procedural change to be long delayed."[79] And since it almost always rests at the end of the legislative agenda, rulemaking legislation is notably vulnerable to what Pound called "the ax-grinding desires of particular law-makers."[80] The combination of lesser interest and political influences are likely to produce "ill-considered practice provisions"[81] that have no better than a fair chance of serving the greater interests of judicial institutions.[82]

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[77] *Id.*

[78] Pound, *supra* note 57, at 602.

[79] Levin & Amsterdam, *supra* note 74, at 10. *See also* Charles W Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV 623, 643 (1957); Benjamin Kaplan & Warren J. Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of* Winberry v. Salisbury, 65 HARV L. REV 234, 252 (1951).

[80] Pound, *supra* note 57, at 602. *See also* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act,* 1989 DUKE L.J. 281, 302 (stating that "[Judges] can be expected to be energetic in serving the longer-term interests of judicial institutions, and insensitive to the political influences that impede legislators' efforts to devise effective procedure").

[81] Joiner & Miller, *supra* note 79, at 643.

[82] One could easily conclude that some, if not most, of the previously described amendments to Kentucky's Evidence Rules are illustrative of ill-considered practice provisions that serve the political interests of small groups at a considerable cost to the long-term interests of the adjudicatory system. It is hard to find any other explanation for the creation of a special evidentiary privilege for fee-

What is the hangup with judicial rulemaking if courts are more expert in the subject, have greater interest in the problems, and are more insulated from political influences? It has been said that courts should not be permitted to make rules they will have to later interpret.[83] It has also been said that courts are likely to impinge upon substantive rights in exercising rulemaking powers, "not because judges would make rules governing substantive law as such, but rather because procedure and substance are inextricably interwoven."[84] More convincingly, it has been said that courts have shown that they cannot be trusted to exercise rulemaking authority when the need arises: "[I]t is worth recalling that the monuments of procedural reform of the nineteenth century were legislative. [T]he courts, given a power to make rules, did not live up to their corresponding responsibility "[85] This, say the proponents of judicial rulemaking, is ancient history that tells a half-truth about the judiciary's use of its rulemaking authority During the twentieth century, "despite crowded dockets and backlogs, despite a primary interest in adjudication, despite an alleged inertia and disinclination to act, courts have in fact acted and the results have not been unworthy "[86]

Courts have undeniably done better with their rulemaking power during the last two-thirds of the twentieth century Legislatures have responded by delegating to them more and more authority over the field; most prominently, "Congress has accorded to the federal judiciary primary responsibility for its own effectiveness."[87] But courts have yet to throw off the yoke of their nineteenth century resistance to the overhaul of a totally obsolete system, and the fear of renewed inertia and conservatism remains the single biggest concern about resting control of practice and procedure in the judiciary, especially control that forecloses all possibility of legislative intervention.

C. *Sources of Rulemaking Power*

It is widely accepted that there are three possible sources of power for judicial rulemaking. The first one is a self-proclaimed "inherent power

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based pastoral counseling.

[83] "The combination of rulemaking and rule applying roles renders the deciding judges unable to impartially decide the validity of their own rules." Grau, *supra* note 63, at 430.

[84] Levin & Amsterdam, *supra* note 74, at 13-14.

[85] Kaplan & Greene, *supra* note 79, at 252.

[86] Levin & Amsterdam, *supra* note 74, at 12.

[87] Carrington, *supra* note 80, at 324.

to prescribe such rules of practice, pleading, and procedure as will facilitate the administration of justice."[88] It is an implied constitutional power that is derived "from the very nature of judicial power itself,"[89] although some might argue that the "judicial Power" is not so far-reaching: "'Judicial power is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.'"[90]

Because of the emergence of sounder foundations for judicial rule-making power, whether or not this inherent power to promulgate rules does indeed exist has been described as a "'purely academic'"[91] issue. However, most commentators would likely agree with the observation that "it seems irrefutable that courts possess a certain measure of inherent rule-making power."[92] They would not agree, however, as to the nature of the power[93] and at least some would say that its "precise scope may be debatable."[94]

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[88] State v Roy, 60 P.2d 646, 660 (N.M. 1936). *See also* State v Clemente, 353 A.2d 723 (Conn. 1974); Burney v Lee, 129 P.2d 308 (Ariz. 1942).

[89] Terry A. Moore, *Does the Alabama Supreme Court Have the Power to Make Rules of Evidence*. 25 CUMB. L. REV 331, 332 (1995). *See also* Southern Pac. Lumber Co. v. Reynolds, 206 So. 2d 334, 335 (Miss. 1968) (holding that "[t]he phrase 'judicial power' in section 144 of the [Mississippi] Constitution includes the power to make rules of practice and procedure, not inconsistent with the Constitution, for the efficient disposition of judicial business").

[90] Muskrat v United States, 219 U.S. 346, 356 (1911) (quoting S. MILLER, THE CONSTITUTION 314 (1891)). *See also* State v. Clemente, 353 A.2d 723, 728 (Conn. 1974) (holding that "[t]he most basic component of this power is the function of rendering judgment in cases before the court").

[91] Burbank, *supra* note 73, at 1021 n.19.

[92] Joiner & Miller, *supra* note 79, at 626. *See also* Burbank, *supra* note 73, at 1116 (agreeing although noting that "arguments [for the power] often reflected the passion of the reformer more than the detachment of the scholar"); Levin & Amsterdam, *supra* note 74, at 3 (agreeing although referring to "an *alleged* inherent power to engage in rule-making") (emphasis added).

[93] Wigmore argued that rulemaking is so essential to the judicial power that it preempts the field and renders all legislative encroachment improper and unconstitutional. *See* Wigmore, *supra* note 59, at 276. Reservations about the validity of this position have been expressed by a variety of commentators, see, for example, Burbank, *supra* note 73, at 1116, but none more strongly than the observation that "Wigmore's omnibus argument is better taken as the jeu d'esprit of a master than as a serious constitutional analysis." Kaplan & Greene, *supra* note 79, at 251, Levin & Amsterdam, *supra* note 74, at 3.

[94] Joiner & Miller, *supra* note 79, at 626.

The authority of courts over matters of procedure is based in some jurisdictions on "rules enabling" legislation. Disenchantment with the nineteenth century procedure codes produced a powerful movement favoring a transfer of rulemaking responsibility and authority from legislatures to courts.[95] It appears to have begun in state systems before the end of the nineteenth century[96] but clearly climaxed with the 1934 enactment of the Rules Enabling Act, authorizing the Supreme Court to promulgate rules of practice and procedure for federal courts. It has been suggested that the rules enabling statutes merely restore to the judiciary power earlier usurped by legislatures,[97] and that the power granted by such statutes merely supplements the inherent power described above.[98] To the contrary, it is clear that judicial rulemaking in the federal system is based on delegated authority, and that the enabling statute itself exists at the will of the legislature.[99] In any event, judicial rulemaking is authorized in some jurisdictions by a statutory grant of power.

In other jurisdictions, the source of power for rulemaking by the judiciary is an explicit constitutional grant. Some provisions even seem to require the adoption of rules, perhaps in response to the inertia concern,[100] while others speak in terms of authority to act.[101] They typically authorize the adoption of rules relating to "procedural matters"[102] or "practice and procedure,"[103] always clearly suggesting that rulemaking does not extend to "substance;" very few explicitly authorize the adoption of evidence rules.[104] They usually say nothing of exclusivity of the power but have been so construed by courts;[105] some empower courts to prescribe rules but

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[95] *See* Carrington, *supra* note 80, at 301, *see also* Pirsig & Tietjen, *supra* note 65, at 153.

[96] *See* Carrington, *supra* note 80, at 301.

> Indeed, it was the mother of parliaments—the British Parliament—that first embraced the idea of transferring responsibility for civil procedure to the judges themselves. The Rules Enabling Act of 1934 was an imitation of the English Judicature Act of 1975, already imitated by several American states beginning with Wyoming in 1890.

Id.

[97] *See* Riedl, *supra* note 57, at 602.

[98] *See* Joiner & Miller, *supra* note 79, at 626.

[99] *See* Kaplan & Greene, *supra* note 79, at 241.

[100] *See, e.g.*, ALASKA CONST. art. IV, § 15; VT. CONST. ch. II, § 37

[101] *See, e.g.*, ARIZ. CONST. art. VI, § 15; MO. CONST. art. V, § 5.

[102] ARIZ. CONST. art. VI, § 5.

[103] COLO. CONST. art. VI, § 21, NEB. CONST. art. V, § 25.

[104] *See, e.g.*, UTAH CONST. art. VIII, § 4.

[105] *See, e.g.*, State v. Robinson, 735 P.2d 801 (Ariz. 1987); Walstad v. State, 818 P.2d 695 (Alaska Ct. App. 1991).

reserve for legislative bodies a power of review and disapproval.[106] Presumably, they render enabling legislation unnecessary and inherent powers redundant.

D. Federal Rulemaking

The United States Constitution nowhere mentions the power to make rules of practice and procedure. It vests the "judicial Power" in the Supreme Court and such inferior courts as Congress may "ordain and establish"[107] and extends that power to a select list of "Cases" and "Controversies."[108] While there is some historical support for finding within this power some judicial rulemaking authority,[109] the attention of the Supreme Court has been drawn to the Constitution's language:

> [B]y the express terms of the Constitution, the exercise of the judicial power is limited to "cases" and "controversies." Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.[110]

Powerful voices sounded in favor of "inherent power" nonetheless,[111] although the best that can be extracted from the pronouncements of the Court on the point is ambiguity and uncertainty [112]

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[106] *See, e.g.*, FLA. CONST. art. V, § 2(a); MD. CONST. art. IV, § 18; OHIO CONST. art. IV, § 5(B).

[107] U.S. CONST. art III, § 1.

[108] *Id.* § 2.

[109] "[I]f anything was received from England as a part of our institutions, it was that the making of these general rules or practice was a judicial function. Indeed, this was well understood in the beginning of American law." Pound, *supra* note 57, at 601.

[110] Muskrat v. United States, 219 U.S. 346, 356 (1911).

[111] *See* Pound, *supra* note 57; Wigmore, *supra* note 59.

[112] The Supreme Court has never satisfactorily explained—indeed it has hardly discussed—the place of court rulemaking in our constitutional framework. The early cases in which the sources and limits of the rulemaking power were treated, set a pattern of ambiguity that has not been departed from. Not even the power of federal courts to regulate procedure by court rules in the absence of legislative authorization is made clear in those cases, and it has not been made clear since.

Burbank, *supra* note 73, at 1115. *See also* Comment, *supra* note 60.

In its early decisions, the Supreme Court left no doubt concerning the rulemaking authority of Congress. As early as 1825, it indicated that such authority existed[113] and shortly thereafter explained more clearly that the congressional power to ordain and establish inferior courts carries with it the power "to prescribe and regulate the modes of proceeding in such Courts."[114] In a more recent and more notable case, the Court expressed itself ever more vividly on the point: "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States."[115] The Court has never said that this "undoubted power" is the whole power to regulate procedure in the federal courts,[116] but in these and other concessions about congressional authority it has created a clear impression that "the ultimate rulemaking authority [in the federal system] inheres in Congress."[117]

Congress elected very early to delegate rulemaking authority to the federal judiciary [118] Limitations on this authority lasting into the twentieth century effectively divided the rulemaking power between the two branches and produced a very complex and inadequate procedural system.[119] After a lengthy battle over where rulemaking should occur,[120] Congress substantially expanded its delegation of authority to the judiciary by enacting the most important procedure statute of the twentieth century—the Rules Enabling Act of 1934.[121] Although refined somewhat

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[113] In *Wayman v. Southard*, 23 U.S. (10 Wheat) 1 (1825), it ruled that Congress may properly delegate power to regulate procedure to the courts, plainly implying that it had such power to delegate. *See id.* at 43.

[114] Livingston v Story, 34 U.S. (9 Pet.) 632, 656 (1835).

[115] Sibbach v Wilson & Co., 312 U.S. 1, 9-10 (1941) (footnote omitted).

[116] "[A]rticle III, section 1, authorizes Congress to prescribe lower federal court procedure. The congressional authority to prescribe rules of practice and procedure is not exclusive, however." Whitten, *supra* note 57, at 48-49 (footnotes omitted).

[117] Gianelli, *supra* note 5, at 24-25.

[118] *See* Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

[119] While the Supreme Court had authority to adopt rules of procedure for cases in admiralty and equity (and in fact exercised that authority), Congress required by statute that federal procedures in actions at common law conform to procedures used in such actions in state courts. *See* Whitten, *supra* note 57, at 48-51, Comment, *supra* note 60, at 87-91.

[120] *See, e.g.*, Clark, *supra* note 73, at 145-48; Joseph A. Wickes, *The New Rule-Making Power of the United States Supreme Court*, 13 TEX. L. REV 1, 3-10 (1934).

[121] Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934).

since enactment, the essential components of the statute remain intact: "(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure for cases in the United States district courts (b) Such rules shall not abridge, enlarge, or modify any substantive right."[122] In delegating its authority, Congress imposed an obligation on the Court to report its actions and fixed a deferred effective date for adopted rules to allow for congressional disapproval if desired.[123] It has not often exercised its disapproval option,[124] but its ability to do so serves as a reminder that ultimate control over rulemaking for federal courts rests with Congress.

E. Kentucky Rulemaking

Kentucky's history of judicial rulemaking parallels that of the country Its early constitutional provisions vested "judicial power" in the supreme court and inferior courts but said nothing of rulemaking by courts.[125] Its first procedural system was inherited from England and lasted until the General Assembly joined the mid-nineteenth century reform movement and adopted statutory rules of practice and procedure.[126] The statutory system lasted through the middle of the twentieth century, until the General Assembly acted on its own to withdraw from the procedure field. It enacted a 1952 statute purporting to delegate rulemaking authority to the supreme court[127] and directing the court to promulgate rules of practice and pro-

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[122] 28 U.S.C. § 2072 (1990).

[123] *See id.* § 2074.

[124] The most dramatic disapproval of court-adopted rules occurred when Congress deferred the effective date of proposed evidence rules unless and until enacted into law by Congress. *See* Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (1973). This is said to have broken a "long-enduring pattern of congressional acquiescence" in rules adopted by the Court. *See* Burbank, *supra* note 73, at 1018.

[125] *See* KY. CONST. of 1850, art. IV, § 1.

[126] *See* Act of Mar. 22, 1851, ch. 616, 1850 Ky. Acts 106. The legislative record shows the dissatisfaction with the existing system that pushed the reform and the influence of the recently completed reform that occurred in New York with the adoption of the famous Field Code. *See* H.R. Rep., Code of Practice Comm., H.R. Journal 449, 451-54 (Ky. 1850-51).

[127] It is easy to see from the following language of the statute that the General Assembly acted to incorporate into the law of Kentucky the essence of the federal Rules Enabling Act of 1934: "The Court of Appeals, by rules promulgated from time to time, shall regulate pleading, practice, procedure and the forms thereof in all civil proceedings in all courts of the state Such rules shall not abridge,

cedure for civil cases;[128] a decade later, it passed an unusual if not bizarre statute that enacted rules of procedure for criminal cases while declaring that henceforth rules of procedure would be left to the discretion of the judiciary [129]

The supreme court's position on rulemaking powers during this period of legislative dominance is unclear. It once wrote that it was "without power to set aside [a] Code provision by the adoption of an inconsistent rule,"[130] and it seemed to acknowledge legislative supremacy by adopting rules of civil procedure as directed by the rules enabling legislation of 1952. On the other hand, it stated more than once that courts "have inherent power to prescribe rules to regulate their proceedings and to facilitate the administration of justice."[131] It described the power as "a necessary incident" to the "judicial power,"[132] and held that rules adopted pursuant thereto would prevail over rules enacted by the legislature[133] but offered little guidance on the reach and limits of the power.

The move from legislative to judicial rulemaking concluded in 1975 with the adoption of Section 116 of the Kentucky Constitution, an explicit constitutional grant of rulemaking power to the supreme court in the following language: "The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and *rules of practice and procedure* for the Court of Justice. "[134] There is not much about this provision in the legislative record of its adoption.[135] It is undoubtedly based

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enlarge or modify the substantive rights of any litigant." Act of Feb. 25, 1952, ch. 19, § 1, 1952 Ky. Acts 29

[128] "The Court of Appeals shall promulgate the initial rules pursuant to this Act on July 1, 1953, and such rules shall become effective on that date." *Id.*

[129] *See* Act of Mar. 22, 1962, ch. 234, 1962 Ky. Acts 788. What qualifies this legislation as bizarre is a preamble announcing that the authority to regulate court proceedings is vested in the "judicial power" held by the judiciary, that the General Assembly's intrusion into the area is at the pleasure of the courts "as a matter of comity," and that in the future the General Assembly will leave the "details of procedure to the discretion of the Judicial Department." *Id.* at 788-89.

[130] Tuttle v. Commonwealth, 77 S.W.2d 351 (Ky. 1934).

[131] Craft v. Commonwealth, 343 S.W.2d 150, 151 (Ky. 1961). *See also* Hobson v. Kentucky Trust Co. of Louisville, 197 S.W.2d 454 (Ky. 1946), *overruled in part by* Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1964); Burton v. Mayer, 118 S.W.2d 547 (Ky. 1938).

[132] *Burton*, 118 S.W.2d at 549; *Craft*, 343 S.W.2d at 151.

[133] *See Burton*, 118 S.W.2d at 547

[134] KY. CONST. § 116 (emphasis added).

[135] What one finds in the 1974 legislative record is that the judicial reform article passed the General Assembly without modification and without significant

on a provision in the 1962 version of the Model State Judicial Article[136] and differs from that model solely in its failure to explicitly permit the adoption of rules of evidence.[137] It is no more or less definitive concerning the rulemaking power of the judiciary than rules enabling laws of most other jurisdictions[138] but it does remove all doubt about where the power resides.

F Back to Rule 1102

As described earlier, Rule 1102 uses Kentucky's constitutional rulemaking provision (Section 116) to define the authorities of the supreme court and General Assembly to amend the Rules of Evidence. Its approach, biblically speaking, is to render unto the supreme court what is the court's and unto the General Assembly what is the Assembly's—exclusive ultimate control of "practice and procedure" to the court and exclusive ultimate control of "substance" to the Assembly What it renders to the court and to the General Assembly in specific terms requires further inquiry What is "practice and procedure" and what is "substance?" Where does "procedure" end and "substance" begin in the law of evidence? The first of these issues is addressed in Part III of the Article and the second is addressed in Part IV

III. PROCEDURE VS. SUBSTANCE

A. Introduction

Some grants of rulemaking authority use the word "practice,"[139] others use "procedure,"[140] while still others (like Section 116) use "practice and

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debate. *Compare* S.B. 183, Senate Journal, at 641-45 (Ky. 1974) *with* Act of Mar. 20, 1974, ch. 84, 1974 Ky. Acts 168.

[136] MODEL STATE JUDICIAL ARTICLE § 9 (1962), *reprinted in* 47 J. AM. JUDICATURE SOC'Y 6, 12 (1963).

[137] The crucial part of the model reads as follows: "The Supreme Court shall have the power to prescribe rules governing appellate jurisdiction, rules of practice and procedure, and rules of evidence, for the judicial system." *Id.*

[138] The supreme court has ruled that its power under the provision is "exclusive." *See* Turner v. Kentucky Bar Ass'n, 980 S.W.2d 560, 563 (Ky. 1998). It has found legislative infringement of that exclusive power from time to time. *See, e.g.*, O'Bryan v. Hedgespeth, 892 S.W.2d 571 (Ky. 1995); Drumm v. Commonwealth, 783 S.W.2d 380 (Ky. 1990); Gaines v Commonwealth, 728 S.W.2d 525 (Ky. 1987). But it has not attempted to define the terms "practice and procedure" or to delineate the exact limits of its rulemaking power under the provision.

[139] MICH. CONST. of 1908 art. VII, § 5.

[140] ARIZ. CONST. art VI, § 5; N.D. CONST. art. VI, § 3.

procedure."[141] All are designed to reach the judicial process for enforcing rights and duties and are generally viewed as legal equivalents: "Considering the accepted definitions of the terms 'practice' and 'procedure,' and recognizing the types of matters which have been held to be within the term 'practice' as used in the rule-making grant of authority, it seems clear that the words are generally used synonymously."[142] Unlike some grants of rulemaking authority,[143] Section 116 does not explicitly foreclose judicial intrusion upon "substantive rights." Yet it could hardly be clearer that the legislature reigns supreme over matters affecting such rights and that the dichotomy demanded by the provision is between "substance" and "procedure."[144]

It is well-known that "substance" oftentimes gets packaged as "procedure"—what has been described as "substantive considerations secreted in procedural interstices."[145] The parole evidence rule is perfectly illustrative, an example of substantive law camouflaged as a rule of evidence; others are better disguised, less obviously substantive, and more difficult to classify. It is also well-known that "substance" and "procedure" oftentimes get jointly packaged in a single product. Statutes of limitations are illustrative of such jointly-packaged laws; they are procedural in the sense that they guard against erroneous decisions on "stale" claims but, at the same time, are substantive in the sense that they serve to reduce stress and anxiety in the citizenry. Classification in these situations is especially difficult, partly because substance and procedure are almost inextricably intertwined and partly because the two concepts remain imprecisely defined even after decades of development.

The words "substance" and "procedure" have been described as "mystic,"[146] vague,[147] and "elusive."[148] Most authorities accept the difficulty of distinguishing between the two concepts;[149] some have tended to

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[141] ALASKA CONST. art. IV, § 15; OHIO CONST. art. IV, § 5(B).

[142] Joiner & Miller, *supra* note 79, at 634.

[143] *See, e.g.*, 28 U.S.C. § 2072 (1982); OHIO CONST. art. IV, § 5(B).

[144] "Nothing could be clearer than the fact that courts in the exercise of the rule-making power have no competence to promulgate rules governing substantive law." Levin & Amsterdam, *supra* note 74, at 14. "It is fundamental that court rules cannot abrogate or modify substantive law." Joiner & Miller, *supra* note 79, at 634.

[145] Levin & Amsterdam, *supra* note 74, at 19.

[146] Carrington, *supra* note 80, at 284.

[147] *See* Thomas Green, Jr., *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence*, 26 A.B.A. J. 482, 483 (1940).

[148] Burbank, *supra* note 73, at 1188.

[149] "[S]ubstance and procedure differ even if, at the margin, they become difficult to distinguish." Carrington, *supra* note 80, at 284.

overstate the difficulty, describing the distinction as "impossible."[150] Hardly anyone would claim that there is a bright line separating the two, but most lawyers and judges would agree with Professor Ely's observation that "[w]e have, I think, a moderately clear notion of what a procedural rule is."[151] Whether we do or not, it is clear that the concepts play crucial roles in the law and have to be distinguished no matter how difficult that task might be, as Justice Rutledge noted more than fifty years ago: "[I]n many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible. But, even so, this fact cannot dispense with the necessity of making a distinction. Judges therefore cannot escape making the division."[152] Contrary to this statement, the difficulty does not in fact exist in "many" situations, for in most instances, the distinction between substance and procedure is so clear that no question arises. The difficulty arises only in what Professor Cook in his classic article called a "no-man's land,"[153] situations in which "the substantive shades off by imperceptible degrees into the procedural"[154] and makes almost any decision "appear to some extent arbitrary."[155]

The distinction between procedure and substance is made for a variety of legal purposes. It is made, for example, in determining the reach of the law's prohibition against ex post facto laws[156] and in the application of principles governing choice-of-law issues.[157] It is also made in resolving

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[150] "[B]ecause of carelessness in the use of the terms it is now impossible to determine what is meant by the terms 'substantive law' and 'procedural law.'" Riedl, *supra* note 57, at 604. *See also* Levin & Amsterdam, *supra* note 74, at 14 ("Yet virtually everyone concedes that 'rational separation is well-nigh impossible.'").

[151] John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV L. REV 693, 724 (1974).

[152] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting). *See also* Levin & Amsterdam, *supra* note 74, at 20 ("No clearly preferable alternatives have been forthcoming and constitutions continue to use the familiar phrase. Consequently, it remains necessary to deal with its meaning.").

[153] Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 351 (1933).

[154] *Id.* at 343.

[155] *Id.* at 356.

[156] In *Hopt v. Utah*, 110 U.S. 574, 590 (1884), the Supreme Court said that the prohibition against ex post facto laws does not extend to statutes involving modes of procedure. In *Thompson v. Missouri*, 171 U.S. 380 (1898), it refused to extend the prohibition to a statute "regarded as one merely regulating procedure." *Id.* at 388.

[157] While courts may look to the law of a foreign state in dealing with matters of substance, they will look to the law of the forum in dealing with matters of

disputes over whether federal or state law should govern in federal diversity of citizenship cases[158] and, most importantly for our purposes, in determining the limits of the judiciary's power to make rules of court. Cook warned against an assumption that substance and procedure have universal meanings for all purposes,[159] and the Supreme Court concurred in *Hanna v. Plumer*[160] when it said that "[t]he line between 'substance' and 'procedure' shifts as the legal context changes."[161] No one suggests that decisions rendered for one purpose are meaningless with respect to another,[162] only that "what may be considered procedural for one purpose may be considered substantive for another."[163]

B. The Rules Enabling Act

The distinction between substance and procedure is examined in this Article for the purpose of allocating lawmaking authority between the legislative and judicial branches of government. The best source of guidance on the subject is undoubtedly the federal Rules Enabling Act, which has remained largely intact and drawn heavy attention from courts, lawmakers and scholars for more than six decades. In its pertinent provisions, the statute reads as follows: "(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals. (b) Such rules shall not abridge, enlarge or modify any substantive right."[164] Although much has been debated

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procedure. *See* Cook, *supra* note 153, at 351.

[158] *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[159] If one glances back over this list of purposes for which the distinction under discussion is drawn, one sees at once that a person asking where the line *ought* to be drawn might well conclude that this ought to be at one place for one purpose and at a somewhat different place for another purpose. *See* Cook, *supra* note 153, at 343.

[160] Hanna v. Plumer, 380 U.S. 460 (1965).

[161] *Id.* at 471.

[162] As noted by Cook, *supra* note 153, at 344:

> "This is not to say that they ought to have no weight at all; far from it. It is merely to point out that at most they make out a *prima facie* case, and even that is perhaps to overstate the case for their use as precedents in really doubtful cases involving different purposes."

[163] Joiner & Miller, *supra* note 79, at 635.

[164] 28 U.S.C. § 2072 (1994).

about the objectives and coverage of the enabling statute,[165] no one disputes that its principal thrust was to delegate Congress's power over practice and procedure to the Supreme Court. Almost immediately after enactment of the statute, the Court adopted the Federal Rules of Civil Procedure and set the stage for the first of its most influential opinions on the meaning of the words "practice and procedure"—*Sibbach v. Wilson & Co.*[166]

Sibbach was a personal injury action brought in federal court under diversity jurisdiction. The plaintiff was ordered to submit to a physical examination, as authorized by a newly adopted federal rule, but refused, contending that adoption of the examination rule exceeded the Supreme Court's authority under the Enabling Act.[167] The Court rejected this contention, sustained the examination rule, and provided the following definition of procedure: "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[168] There is no litmus test in the conclusions that procedure "really regulates procedure" and substance recognizes "rights and duties." Perhaps knowing this, the Court added that rules adopted under the Enabling Act must pass muster under its policy of promoting court procedures that foster a "speedy, fair and exact determination of the truth."[169] Sixty years after *Sibbach*, when physical examinations of plaintiffs are routine, it is easy to see that the examination rule fostered a fair determination of issues concerning the nature and extent of the plaintiff's injuries, and that it could easily be classified as "procedure" rather than "substance."[170]

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[165] Scholars have differed over whether Congress was acting to allocate lawmaking powers between the judicial and legislative branches of government or to address the very different problem of choosing between state and federal law in federal diversity cases; they have also differed over the relationship of the two subsections of the statute and specifically whether the second part of the statute serves any purpose not served by the first part. *See, e.g.*, Ely, *supra* note 151, Burbank, *supra* note 73; Carrington, *supra* note 80.

[166] Sibbach v Wilson & Co., 312 U.S. 1 (1941).

[167] The plaintiff did not contend that the examination rule failed under the "practice and procedure" requirement of the Act's first sentence, but rather that it constituted an abridgment of substantive rights and thus violated the limitation fixed by the Act's second sentence.

[168] *Sibbach*, 312 U.S. at 14.

[169] *Id.*

[170] *Sibbach* split the Court 5-4, indicating that classification of the rule was far more difficult when physical examination was not routine. In writing for the

Sibbach was decided only three years after the landmark decision in *Erie Railroad v. Tompkins*.[171] It was rendered as a decision on the rulemaking authority of the judiciary but became engulfed in the federal/state choice-of-laws issues produced by the decision in *Erie Railroad*, where the substance/procedure distinction is also important. For more than two decades, lower courts struggled with the relationship of the two decisions and with questions about the applicability in diversity cases of federal rules of procedure that contradict provisions of state law [172] The Supreme Court rendered a series of unsettling decisions on these subjects[173] before issuing its watershed opinion in *Hanna v. Plumer* [174]

Hanna was also a personal injury claim filed in federal court under diversity jurisdiction. It was filed in time to satisfy an applicable state statute of limitations if the adequacy of service of process was adjudged under the Federal Rules of Civil Procedure, which provide for delivery of process to a defendant's residence, but not if adjudged under a provision of the state limitations statute which required personal service upon the defendant.[175] The trial court concluded that state law governed and granted summary judgment for the defendant;[176] the court of appeals affirmed, describing the dispute as a "substantive rather than a procedural matter"

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dissenters, Justice Frankfurter saw the examination rule as too much of "a drastic change in public policy" to fall within authorization to formulate rules for the effective dispatch of court business. "I deem a requirement as to the invasion of the person to stand on a very different footing from questions pertaining to the discovery of documents, pre-trial procedure and other devices for the expeditious, economic and fair conduct of litigation." *Id.* at 18 (Frankfurter, J., dissenting).

[171] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[172] *See, e.g.*, Fontenot v. Roach, 120 F Supp. 788 (E.D. Tenn. 1954); Occidental Life Ins. Co. of California v. Kielhorn, 98 F Supp. 288 (W.D. Mich. 1951); Bohn v. American Export Lines, 42 F Supp. 228 (S.D.N.Y 1941); Jeub v B/G Foods, Inc., 2 F.R.D. 238 (D. Minn. 1942).

[173] *See, e.g.*, Ragan v Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Cohen v Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Mississippi Publ'g Corp. v. Murphree, 326 U.S. 438 (1946).

[174] Hanna v. Plumer, 380 U.S. 460 (1965).

[175] *See id.* at 461. The plaintiff had left copies of the summons and complaint with the defendant's spouse at his residence. *See id.*

[176] By this time, the Supreme Court had rendered its decision in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), holding that the choice between state and federal law in diversity cases would be determined by application of an outcome-determinative test—"the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Id.* at 109.

and concluding that *Erie* required reliance on state rather than federal law [177] The question posed for the Supreme Court by these rulings was whether "service of process [in diversity litigation] shall be made in the manner prescribed by state law or that set forth in Rule 4(d)(1) of the Federal Rules of Civil Procedure."[178] The Court concluded that the Federal Rules of Civil Procedure controlled the service of process issue and reversed.[179]

The Court for the first time drew a sharp line between the two issues that had coalesced in earlier opinions: the authority of the Court to adopt rules of procedure and the constitutional obligation of federal courts to apply state law in diversity cases. The first, a separation of powers problem, is governed by the Rules Enabling Act; the second, a federalism problem, is governed by *Erie Railroad* and its progeny [180] More importantly for our purposes, in speaking of rulemaking powers, the Court reaffirmed its *Sibbach* definition of "procedure" and then added a yardstick by which to measure rules that may have both substantive and procedural components:

> [T]he constitutional provision for a federal court system carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.[181]

Justice Harlan suggested in his concurring opinion that this test, which he characterized as an "arguably procedural"[182] test, was overly generous in its description of rulemaking authority and that it did little to ease the difficulty of distinguishing between "substance" and "procedure."[183] In a

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[177] *See Hanna*, 380 U.S. at 463.

[178] *Id.* at 461.

[179] *See id.* at 463-64.

[180] "It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions." *Id.* at 471.

[181] *Id.* at 472.

[182] *Id.* at 476 (Harlan, J., concurring).

[183] His concern was the effect of the expansive definition on federalism principles: "So long as a reasonable man could characterize any duly adopted federal rule as 'procedural,' the Court would have it apply no matter how seriously it frustrated a State's substantive regulation of the primary conduct and affairs of its

later opinion, the Court may have intended to qualify its position when it said that court-adopted rules may have an "incidental" effect on substantive rights without exceeding the rulemaking authority of the Rules Enabling Act.[184]

Although the Rules Enabling Act and these cases do not draw a clear line between "substance" and "procedure," they shed meaningful light on the subject in several ways. *Sibbach* reassures us that we do indeed have a "moderately clear notion" of what rules of procedure look like and, by insisting that court rules "really" regulate procedure, it warns against decisions that intrude upon areas that are clearly inappropriate for the judiciary *Hanna* draws attention to the reality that "substance" and "procedure" are not mutually exclusive and oftentimes intermingle in single rules; it identifies the need for a standard for classifying such rules, even though the one it suggests might indeed be overly generous in its allocation of rulemaking power to the judiciary

C. *Scholarly Dissertations*

Legal scholars wrote extensively about the substance/procedure distinction long before controversy erupted over whether courts or legislatures should enact evidence rules,[185] although others were moved to write on the subject after Congress disrupted the judicial effort to produce federal rules of evidence.[186] They have elevated the discussion by more clearly identifying underlying policies and by drawing attention to those policies rather than to formulas for the solution of particular problems. They have provided no litmus test for making the distinction but have moved beyond *Sibbach* and *Hanna* in efforts to formulate standards by which to distinguish substance from procedure in concrete situations.

One of the first influential descriptions of the distinction between substance and procedure was offered by Riedl, who thought that formulation of a distinction was "impossible."[187] The judiciary is given rulemaking power, he said, to provide "the people an efficient, adequate, simple,

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citizens." *Id.* (Harlan, J., concurring).

[184] *See* Burlington N. R.R. v. Woods, 480 U.S. 1, 5 (1987). *See also* Carrington, *supra* note 80, at 299 ("Implied in *Burlington Northern* is a constraint on rules of court affecting substantive rights in ways that are more than 'incidental.'").

[185] *See, e.g.*, Levin & Amsterdam, *supra* note 74; Joiner & Miller, *supra* note 79.

[186] *See, e.g.*, Ely, *supra* note 151, Burbank, *supra* note 73.

[187] Riedl, *supra* note 57, at 604.

prompt, and inexpensive administration of justice"[188] and the reach of that power is limited to the purpose for which it exists:

> The test we propose is whether a given rule is a device with which to promote the adequate, simple, prompt and inexpensive administration of justice in the conduct of a trial or whether the rule, having nothing to do with procedure, is grounded upon a declaration of a general public policy.[189]

He wrote before *Hanna*, oversimplified the problem by inadequately considering the extent to which substance and procedure intermingle in single rules, and was criticized for having assumed that rules "fall neatly into one of two pigeon-holes."[190] Yet he advanced the discussion by drawing the distinction between rules that promote an effective justice system and laws that express some "[g]eneral [p]ublic [p]olicy "[191]

Another of the earlier commentators on the substance/procedure distinction was Professor Joiner, who published after *Sibbach* and before *Hanna*.[192] In citing Riedl approvingly,[193] he acknowledged the difficulty of segregating governmental functions, calling it "a twilight zone of indefinition"[194] and said that it must be recognized "that there are areas in which it is not clear whether the legislature or the judiciary should establish the necessary rules."[195] He described the rulemaking power as broad but proposed a conservative standard for distinguishing between substance and procedure:

> If the purpose of [a rule's] promulgation is to permit a court to function and function efficiently, the rule-making power is inherent unless its impact is such as to conflict with other validly enacted legislative or

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[188] *Id.* at 605.

[189] *Id.* at 604.

[190] "The difficulty with Riedl's test is in its major premise. It assumes that the rules which courts will be concerned about categorizing, fall neatly into one of two pigeon-holes: 'declaration of public policy' or 'rule to promote the prompt, inexpensive administration of justice.' Nothing could be further from the truth " Levin & Amsterdam, *supra* note 74, at 21.

[191] *Id.* at 22 (footnote omitted).

[192] Joiner & Miller, *supra* note 79.

[193] *See id.* at 635.

[194] *Id.* at 629.

[195] *Id.*

> constitutional policy involving matters other than the orderly dispatch of judicial business.
>
> Thus when the purpose of the rule is to provide for the establishment and maintenance of the machinery essential for the efficient administration of business, *and it does only that,* the scope of the inherent power vested in the courts is complete and supreme.[196]

Joiner made his view even clearer in a later writing, saying that court rules must "regulate the method of proving cases" and implicate "no other policy involving matters other than the orderly dispatch of judicial business."[197] There is "procedural purity" required by this standard that would seem to tilt the delicate balance as much toward "substance" as *Hanna* would later tilt it toward "procedure," leading some to say that Joiner's position "excludes too much"[198] from the rulemaking authority of the judiciary

Levin and Amsterdam advanced the discussion without attempting to precisely locate the line between substance and procedure. They described that task as "well-nigh impossible,"[199] and noted the special difficulty when procedure is "intimately related with substantive considerations"[200] but conceded that use of the distinction is not likely to disappear.[201] They sounded like other commentators when describing the factors to be weighed and the difficulty of weighing them:

> When we turn to the problem of privilege we meet the classic example of substantive law in the rules of evidence. Extrinsic policy considerations are said to be operative and paramount. This is indeed true, but it must not be forgotten that *the orderly dispatch of litigation,* with the maximum information from permitted sources made available to the tribunal, is also a consideration and is, itself, a matter of high policy.[202]

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[196] *Id.* at 629-30 (emphasis added).

[197] Charles Joiner, *Uniform Rules of Evidence for Federal Courts,* 20 F.R.D. 429, 434 (1957).

[198] Levin & Amsterdam, *supra* note 74, at 23.

[199] *Id.* at 15 (footnote omitted).

[200] *Id.* at 18.

[201] "No clearly preferable alternatives have been forthcoming and constitutions continue to use the familiar phrase ["practice and procedure"]. Consequently, it remains necessary to deal with its meaning." *Id.* at 20.

[202] *Id.* at 22 (emphasis added).

They expressed concern almost simultaneously about "ceding too much to the legislature"[203] and about excessive assumptions of authority by the judiciary.[204]

One of the most influential writings on the substance/procedure distinction was penned by Professor Ely,[205] whose eye was primarily on federalism issues while he wrote about *Sibbach*, *Hanna*, and the Rules Enabling Act.[206] In the midst of matters not very relevant to the present discussion, he provided descriptions of "substance" and "procedure" that are notable, if not remarkable, in their clarity and simplicity:

> We have, I think, some moderately clear notion of what a procedural rule is—one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes. Thus, one way of doing things may be chosen over another because it is thought to be *more likely to get at the truth*, or better calculated to give the parties *a fair opportunity to present their sides of the story*, or because, and this may point quite the other way, it is a means of *promoting the efficiency of the process*. The most helpful way, it seems to me, of defining a substantive rule is as a [rule created] for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.[207]

It is helpful, he said, to think of substance as laws that "'affect people's conduct at the stage of primary private activity'"[208] and necessary in

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[203] *Id.* at 23.

[204] "It is certainly true that a court immunized from any review of its own determinations as to what is within its rule-making power as well as from any veto over what it chooses to promulgate, may prove too prone to assume authority." *Id.* at 24 (footnote omitted).

[205] *See* Ely, *supra* note 151.

[206] Ely was focused on the problem of determining whether federal or state law applies in federal diversity cases (and particularly the extent to which the Rules Enabling Act bears upon that problem). As described above, there is a difference between this problem and the rulemaking power problem that is the subject of discussion in this Article, although both are resolved to some extent by the substance/procedure distinction. One must simply be aware that the distinction may be somewhat different in the two situations, although classification of given rules for one purpose should offer helpful guidance for classification for the other purpose.

[207] Ely, *supra* note 151, at 724-25 (emphasis added) (footnotes omitted).

[208] *Id.* at 725 (footnote omitted). Laws that affect "private primary activity" are sometimes referred to as laws that "affect out of court conduct." Burbank, *supra*

classifying a law to determine whether it "embodies a substantive policy or [promotes] the fairest and most efficient way of conducting litigation."[209] He recognized that classification by this standard would sometimes produce inconclusive separation of substance and procedure:

> [I]t is not at all unlikely that with respect to a given rule the legislature or other rulemaker will have had two (or more) goals in mind—one relating to the managment of litigation and one relating to some other concern. Under the definitions suggested above, such a rule would be both procedural and substantive.[210]

Ely's analytical objectives were met without further classification of such rules.[211] What he might do if forced to classify such rules is unclear, for he says little about the "arguably procedural" test of *Hanna* and nothing to suggest that he might embrace the idea of a "procedural purity" test. There are indications, albeit obscure, that if compelled to classify such a rule he would be guided by the predominant purpose underlying the rule.[212]

Professor Burbank examined the substance/procedure distinction in an impressive study of judicial rulemaking authority under the Rules Enabling Act.[213] He recognized the difficulty of applying the distinction[214] and emphasized the great importance of understanding the fundamental purpose for making the distinction: "The goal of the characterization exercise

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note 73, at 1128.

[209] Ely, *supra* note 151, at 722.

[210] *Id.* at 726.

[211] Ely's research interest involved the question of whether the Rules Enabling Act protected state prerogatives from federal incursion in diversity cases. Part one of the Rules Enabling Act authorizes the Supreme Court to adopt rules of practice and procedure; part two provides that such rules shall not abridge substantive rights. He concluded that rules mixed with substance and procedure could be construed as satisfying part one of the statute without further classification since substantive state policies would be protected by part two. *See id.* at 726-27

[212] In one instance, when discussing whether a rule mixed with substance and procedure could survive the prohibition against abridging substantive rights, he focused on what he described as the "primary reason" for enactment of the rule. *Id.* at 728. In another instance, when discussing this question, he opined that a rule should be counted as "substantive" because its purpose "transcends concerns about how litigation is conducted." *Id.* at 734.

[213] *See* Burbank, *supra* note 73.

[214] "Everybody knows that 'procedure' and 'substance' are elusive words that must be approached in context, and that there can be no one, indeed any, bright line to mark off their respective preserves." *Id.* at 1187-88.

is *to determine the locus of decision-making concerning a particular matter,* the Supreme Court making law through rules of court or Congress."[215] The keystone is whether the particular matter is designed to foster a more intelligent disposition of issues in litigation. "Thus, if lawmaking in an area necessarily involves the consideration of public policy—*policies extrinsic to the process of litigation*—the choices in that area are for [the legislature]."[216] He suggested no particular standard for classifying rules that have both procedural and substantive components but expressed serious reservations about the "arguably procedural" test of *Hanna.*[217]

Professor Carrington also expressed strong reservations about *Hanna* in his study of rulemaking authority under the Rules Enabling Act.[218] He believed that the Court had focused on federalism issues in *Hanna* and had given inadequate attention to separation of powers issues. He labeled the "arguably procedural" expression as a "false step"[219] and said that it had "led us off the trail with respect to the Court's power to enact law based on the broad penumbra of the substance-procedure distinction."[220] He believed, however, that the Court had moderated its view in *Burlington Northern Railroad v. Woods*[221] and had put us back on trail, clearly implying there that rulemaking would not be permitted to affect substantive rights "in ways that are more than 'incidental.' "[222]

Carrington focused more explicitly than others on rules that are "at once both substantive and procedural."[223] His reflections on the merger of substance and procedure in statutes of limitations indicate the importance

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[215] *Id.* at 1123 (emphasis added).

[216] *Id.* at 1190 (emphasis added).

[217] Legal rules always represent choices among conflicting policies. It is well and good to uphold the constitutional power of Congress to "regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." But there is reason to fear that, if the rulemakers are left to make choices in such areas, and whatever the purpose of the dichotomy, they will choose to advance those policies that are their special province and to subordinate those that are not.

Id. at 1191-92 (footnotes omitted).

[218] *See* Carrington, *supra* note 80.

[219] *Id.* at 297

[220] *Id.* at 298.

[221] Burlington N. R.R. v Woods, 480 U.S. 1 (1987).

[222] Carrington, *supra* note 80, at 299.

[223] *Id.* at 290.

of identifying the underlying objectives of any rule that has to be classified as one or the other, such as our rules of evidence:

> Limitations law is famously a body of rules that are neither grass nor hay, being at once both substantive and procedural. In one sense, limitations law is clearly procedural It is a means of clearing dockets [and] also a crude means of evaluating proof, a device to protect fact finders from being beguiled by stale, and therefore, suspect proof.
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> In another sense, however, limitations law is substantive. Repose is a social and political value with economic consequences. Limitations law is thus a means of healing and stablizing relationships. It reduces the general level of stress and anxiety.[224]

According to Carrington, such rules rest at the margin of substance and procedure and may be classified as either, depending upon relative weights of underlying objectives. If substantive considerations are paramount, such rules should be classified as substance rather than procedure.[225]

D. Kentucky Supreme Court

The Kentucky Supreme Court has come no closer to defining "procedure" than to say that its rulemaking power extends only to matters that affect "the orderly dispatch of litigation."[226] It has been far more prone to express itself on the difficulty of drawing a line between substance and procedure than to attempt a formulation of standards by which to undertake such a task: "Inevitably, there is and always will be a gray area in which a line between the legislative prerogatives of the General Assembly and the rule-making authority of the courts is not easy to draw "[227] The court has also been prone to avoid full confrontation with this difficulty by resorting to the use of an approach called "comity," an acceptance of legislative

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[224] *Id.* (footnotes omitted).

[225] *See also* Charles Alan Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV 563, 569 (1967) ("Most people would agree, I think, that substantive changes should come from the legislature This should be as true where the substantive change is the side effect of a procedural reform as where it is made directly.").

[226] Warfield Nat. Gas Co. v. Allen, 33 S.W.2d 34, 35 (Ky. 1930). *See also* Craft v. Commonwealth, 343 S.W.2d 150, 151 (Ky. 1961).

[227] *Ex parte* Auditor of Pub. Accounts, 609 S.W.2d 682, 688 (Ky. 1980). *See also* Commonwealth v. Reneer, 734 S.W.2d 794, 797 (Ky. 1987).

intrusion into judicial territory when the intrusion is adjudged to have enhanced rather than impaired the judicial function.[228]

It is not easy to extract guidance on the substance/procedure distinction from decisions in concrete situations. Tendencies are easier to see than standards and guidelines. The supreme court has rarely imposed meaningful limitations on its own authority,[229] has acted very aggressively against any legislation that even remotely threatens its ability to engage in effective dispute resolution,[230] and has generally adhered to "our moderately clear notion" of procedure and substance in implementing the distinction.[231] But, it has also rendered decisions that seem to be ad hoc in nature, rather than analytical, and that fall far short of producing a coherent and consistent view of where procedure ends and substance begins. The leading case, *O'Bryan v. Hedgespeth*,[232] is illustrative of these conditions.

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[228] "Comity," by definition, means judicial adoption of a rule unconstitutionally enacted by the legislature "not as a matter of obligation, but out of deference and respect." The decision whether to give life through comity to a statute otherwise unconstitutional because it violates separation of powers doctrine is one of institutional policy reserved for the Supreme Court level.

O'Bryan v Hegespeth, 892 S.W.2d 571, 577 (Ky. 1995) (citations omitted).

[229] There is one case in which the court took such action, holding that "the power of a court or magistrate to take away a person's liberty [under a rule of court authorizing peace bonds] is a matter of substance, and cannot originate from the judicial power to regulate practice and procedure in the courts." Lunsford v Commonwealth, 436 S.W.2d 512, 514 (Ky 1969).

[230] *See, e.g.*, Smothers v. Lewis, 672 S.W.2d 62 (Ky. 1984) (ruling that a statute attempting to limit the authority of courts to grant injunctive relief in a case within its jurisdiction infringes upon the judicial function); Arnett v. Meade, 462 S.W.2d 940 (Ky. 1971) (holding that the legislature has no authority to limit the extent of punishment a court may impose on a witness who refuses an order to testify); Burton v Mayer, 118 S.W.2d 547 (Ky. 1938) (ruling that the legislature may not impair the ability of a court to issue an immediate mandate in a case where an effective administration of justice so requires).

[231] *See, e.g.*, Drumm v. Commonwealth, 783 S.W.2d 380 (Ky. 1990) (holding that the statute creating child abuse hearsay exception is an exercise of judicial rulemaking power); Gaines v. Commonwealth, 728 S.W.2d 525 (Ky 1987) (holding that the statute authorizing children to testify on videotape without oath and without being found competent as a witness is procedural rather than substance); O'Bryan v Commonwealth, 634 S.W.2d 153 (Ky. 1982) (holding that a law dealing with hearing on motion for change of venue is procedural); Parragin v Sawyer, 457 S.W.2d 504 (Ky. 1970) (expressing grave doubts about the constitutionality of a statute dealing with taxation of costs to litigants).

[232] O'Bryan v Hedgespeth, 892 S.W.2d 571 (Ky. 1995).

O'Bryan involved litigation over personal injuries produced by an automobile accident. The trial judge ruled that the defendant could introduce evidence that the plaintiff had been reimbursed for certain costs attributable to the accident, so-called "collateral source payments,"[233] under a statute providing for the admissibility of such evidence in an action for damages.[234] The plaintiff argued on appeal that the statute infringed upon the rulemaking power of the supreme court, as defined by Section 116 of the Constitution. The Kentucky Court of Appeals disagreed,[235] but the supreme court granted discretionary review and reversed.

The supreme court looked at the statute, saw a rule bearing on admissibility of evidence, and easily concluded that its rulemaking authority had been violated:

> Responsibility for deciding when evidence is relevant to an issue of fact which must be judicially determined, such as the medical expenses incurred for treatment of personal injuries, *falls squarely within the parameters of "practice and procedure"* assigned to the judicial branch by the separation of powers doctrine and Section 116.[236]

It had not always so easily concluded that evidence rules belonged under its rulemaking authority;[237] nor had it ever expressed serious doubts about

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[233] *Id.* at 573. The evidence was actually introduced by the plaintiff but only after she had lost an in limine motion to exclude the evidence. *See id.* The Supreme Court easily rejected an argument that the plaintiff had not preserved error for review. *See id.* at 574.

[234] The statute also obligated the plaintiff to give notice to parties holding subrogation rights to any award he might receive and indicated that such rights would be lost unless the holder intervened to make claims. *See* K.R.S. § 411.188. The key provision in the statute, however, was undoubtedly the provision allowing a defendant to show that the plaintiff had received collateral source payments. *See id.*

[235] *See O'Bryan*, 892 S.W.2d at 574. The court of appeals had earlier encountered this same argument in another case and it had there ruled that the statute did not infringe upon the rulemaking authority of the supreme court. *See* Edwards v Land, 851 S.W.2d 484 (Ky. App. 1992).

[236] *O'Bryan*, 892 S.W.2d at 576 (emphasis added).

[237] *See, e.g.*, Gaines v. Commonwealth, 728 S.W.2d 525 (Ky. 1987) (finding a violation of judicial rulemaking power by a statute creating child abuse hearsay exception); Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986) (holding that legislation authorizing the use of television cameras to present testimony in child abuse prosecution, at the discretion of the trial court, does not invade any judicial

the many evidence statutes it had regularly construed before the adoption of evidence rules, such as the dead man's act, the spousal privilege statute, a former testimony statute, etc.[238] There was no mention of this history and no obvious recognition of the complexity of the substance/procedure distinction. The ruling was more formalistic than analytical.

There can be no quarrel with the court's conclusion that the "collateral source payments" statute was procedural in nature. The quarrel is with its assumption that the statute was only procedural or predominantly procedural. In explaining its decision that the statute was procedural, the court focused almost immediately upon what surely rests on the substance side of the substance/procedure dichotomy—whether an injured party should get "double recovery" or a tortfeasor (or his/her insurer) should get a "windfall."[239] Yet, it never seriously considered the possibility that the statute was not about the admissibility of evidence, but was instead substance merely packaged as procedure—"substantive considerations secreted in procedural interstices."[240] More fundamentally, it seemed not to have fully considered the question of whether the statute expressed policy choices that should be made by a lawmaking body that is more subject to the popular will than is the court, whose constitutional function

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power); Commonwealth v. Kroger, 122 S.W.2d 1006 (Ky. 1938) (finding that legislature may constitutionally provide that a certain state of facts is prima facie evidence of a disputed fact); Massachusetts Mut. Life Ins. Co. v. Bush, 33 S.W.2d 351 (Ky. 1930) (holding that a statute making death certificate admissible to prove cause of death is within the power of the legislature).

[238] *See, e.g.*, Smith v Commonwealth, 788 S.W.2d 266 (Ky. 1990) (construing spousal privileges statute); Richmond v. Commonwealth, 637 S.W.2d 642 (Ky. 1982) (construing former testimony statute); Creason v Creason, 392 S.W.2d 69 (Ky. 1965) (construing dead man's statute).

[239] The following statement from the opinion clearly speaks of a policy choice that has absolutely nothing to do with the process of litigation:

> There is no legal reason why the tortfeasor or his liability insurance company should receive a "windfall" for benefits to which the plaintiff may be entitled by reason of his own foresight in paying the premium or as part of what he has earned in his employment, and benefits received are usually subject to subrogation so there is no "double recovery" by any stretch of the imagination.

O'Bryan, 892 S.W.2d at 576.

The Court noted that this was the law before the enactment of the "collateral source payments" statute, strongly expressed the belief that this position was legally sound, but said nothing about whether it should have an exclusive right to make this choice for the people.

[240] Levin & Amsterdam, *supra* note 74, at 19.

"is to resolve disputes."[241] The decision in *O'Bryan* might not have been different had the court engaged in a fuller analysis of the separation of powers problem. It would have drawn attention to the fundamental purpose of the substance/procedure distinction, however, and would have laid some groundwork for the development of a conceptual rather than ad hoc approach to the problem.

E. Conclusion

The best authorities concur as to basic propositions concerning the substance/procedure distinction. "Procedure" is the machinery that governs events in the court system; "substance" is the rest of the legal universe.[242] The concepts are clear enough to permit most rules to be pigeon-holed with ease; classification is difficult on the margin where procedure "shades imperceptibly" into substance. Substance is occasionally packaged as procedure, and substance and procedure are oftentimes packaged in a single container. The former should always be classified as "substance" while classification of the latter should depend upon the relative weight of the underlying substantive and procedural considerations. The mixed rules should be classified as "substance" when policy considerations having no bearing on the litigation process are paramount and as "procedure" when they primarily affect litigation and only incidentally affect extrinsic policy considerations.

IV PROCEDURE, SUBSTANCE, AND EVIDENCE LAW

A. Introduction

Uncertainty over whether "practice and procedure" includes the law of evidence surfaced immediately upon the 1934 enactment of the Rules Enabling Act.[243] It survived the 1938 adoption of the Federal Rules of Civil

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[241] *Ex parte* Farley, 570 S.W.2d 617, 623 (Ky. 1978).

[242] Substance is sometimes described as the "what" of the law with procedure being the "how." Sometimes it is said to be the part that creates the rights and duties that are enforced in the courtroom, and sometimes it is described as rules that affect events and conditions outside the courtroom. Professor Morgan offered the following definition: "[R]ules which determine the legal relations between the parties when all the facts are known or assumed are rules of substance." Edmund M. Morgan, *Rules of Evidence—Substantive or Procedural*, 10 VAND. L. REV 467, 468 (1957).

[243] The chairman of the committee appointed to draft civil rules said that there was a difference of opinion as to whether the Enabling Act covered rules of

Procedure[244] only to surface twenty-five years later when the Supreme Court began to consider the adoption of evidence rules. On this later occasion, the Court concluded that the Rules Enabling Act covered evidence law,[245] adopted evidence rules for use in federal courts,[246] and transmitted them for congressional review as required by the Act, although one of its members dissented on the ground that "fashioning rules of evidence is a task for the legislature, not for the judiciary."[247]

Congress's reaction to the court-adopted rules was unfriendly to say the least. Over a two-year period, it conducted hearings on the content of the rules and the authority of lawmakers to create them,[248] heard prominent

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evidence and that the committee had no intention of writing evidence rules. *See* William D. Mitchell, *Attitude of Advisory Committee—Events Leading to Proposal for Uniform Rules—Problems on Which Discussion is Invited*, 22 A.B.A. J. 780, 782 (1936). Professor Burbank said that commentators were closely divided over whether the Act authorized the adoption of rules of evidence. *See* Burbank, *supra* note 73, at 1140.

[244] The Civil Rules included a provision on evidence that was designed to leave the law alone and intact, described as follows by the official reporter of the Advisory Committee:

> [T]he basic rule of evidence then adopted, Federal Rule 43(a), was essentially of a holding nature, as it was so designed. Essentially, the rule provides that evidence admissible either under state procedure or under former federal principles in either law or equity should be admissible under the presently revised procedure; in other words, that the rule of fullest admissibility should everywhere prevail.

Charles E. Clark, *A Symposium on the Uniform Rules of Evidence: Forward*, 10 RUTGERS L. REV 479, 482 (1956).

Some saw the inclusion of any provision on evidence as a sign that rulemaking powers included evidence law. *See, e.g.*, Morgan, *supra* note 242, at 468. Others believed that the Court violated the Enabling Act by including any provisions on evidence law. *See, e.g.*, Burbank, *supra* note 73, at 1142.

[245] The Court appointed a committee to study the question of whether rules of evidence were included within "practice and procedure" and was told by this committee that "[t]he rules of evidence are for the most part procedural and within the rule-making power." Thomas F Green, Jr., *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 114 (1961).

[246] *See* Proposed Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183 (1973) [hereinafter Proposed Rules].

[247] *Id.* at 185 (Douglas, J., dissenting).

[248] *See Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong. 73

commentators again differ over whether the law of evidence is substance or procedure,[249] and at the end of the day enacted the Federal Rules of Evidence into law as statutes.[250] Few believe that these events did much to settle the question of whether evidence law constitutes substance or procedure,[251] although they gave us a "model" for evidence law reform that clearly exists as statutes rather than as rules of court.

Most who have studied the substance/procedure dichotomy in the context of evidence law adhere to the view that "*the great bulk* of what we presently know as the law of evidence is procedure,"[252] which means of course that they also adhere to the view that some part of this law is not procedural. Most acknowledge that there is a shadowy area in the law where procedure ends and substance begins (a "twilight zone") and that "the distinction between substance and procedure is sometimes difficult to discern."[253] Unfortunately, as Justice Rutledge reminded us more than fifty years ago, "this fact cannot dispense with the necessity of making a distinction."[254] This Article inquires as to how far the Kentucky General Assembly can go on its own to amend the Rules of Evidence and has only one way to conclude that inquiry The "substance" in this law must be

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(1973).

[249] For example, former Supreme Court Justice Goldberg testified that the law of evidence is more substantive than procedural and falls within the domain of the legislature. *See id.* at 142-46 (testimony of Hon. Arthur J. Goldberg). On the other hand, Judge Maris, who had been involved in the formulation of the rules, testified that the lawyers, judges, and scholars who had worked on the rules "are fully satisfied that rules of evidence are basically procedural, and . within the rule-making power of the Court." *Id.* at 76 (statement of Albert B. Maris).

[250] *See* Pub. L. No. 93-595, 88 Stat. 1926 (1975).

[251] Some have said, with good reason, that Congress's intervention simply rendered moot the question concerning the Supreme Court's rulemaking power. *See* Burbank, *supra* note 73, at 1022; Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501. Privilege and Vertical Choice of Law,* 82 GEO. L.J. 1781, 1797 (1994). This is because Congress unquestionably possesses the authority to create evidence law for federal courts whether classified as substance or procedure. *See* Tot v. United States, 319 U.S. 463, 467 (1943).

[252] Ronan Degnan, *The Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341, 345 (1959) (emphasis added). *See also* Giannelli, *supra* note 5, at 41 ("The overwhelming number of commentators have concluded that *most* rules of evidence are procedural.").

[253] Dudley, *supra* note 251, at 1797

[254] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting).

separated from the "procedure," a task that should begin with some discussion of standards and guidelines for making the separation.

B. *Standards and Guidelines*

One of the early writers on this subject said that the law of evidence is procedure if it "promote[s] the adequate, simple, prompt, and inexpensive administration of justice"[255] and substance if it "is grounded upon a declaration of general public policy "[256] Professor Joiner added a measure of clarity to this approach in expressing a similar viewpoint:

> [S]o long as the purpose and effect of a rule of evidence is to regulate the method of proving cases, and there is no other policy as established by the state involving matters other than the orderly dispatch of judicial business, promulgation by court rule would be valid. It should thus be clear that most of the rules of evidence fall in this category.[257]

The first of these observations has been faulted for understating the complexity of the substance/procedure relationship in the law of evidence[258] and the second for excluding too much of the law from the procedure category [259] They enhance our understanding of that relationship nonetheless, by reminding us that "accuracy in fact-finding is not the sole rationale for the law of evidence"[260] and by making the crucial point that evidence rules oftentimes "masquerade as rules affecting the manner of proof even as they further other State policies."[261]

In his more recent study of the issue, Professor Dudley placed the substance/procedure boundary between rules "designed to affect conduct outside the courtroom"[262] and rules designed "to enhance the accuracy of

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[255] Riedl, *supra* note 57, at 604.

[256] *Id.*

[257] Joiner, *supra* note 197, at 434.

[258] The criticism is that it assumes that evidence rules fall neatly into one or the other of these pigeon-holes. *See* Levin & Amsterdam, *supra* note 74, at 21.

[259] The criticism is that many evidence rules have both substantive and procedural elements and that insistence upon procedural purity would unduly restrict judicial rulemaking authority. *See id.* at 23.

[260] Dudley, *supra* note 251, at 1795.

[261] Margaret A. Berger, *Privileges, Presumptions and Competency of Witnesses in Federal Court: A Federal Choice-of-Laws Rule*, 42 BROOK. L. REV 417, 419 (1976).

[262] Dudley, *supra* note 251, at 1781.

the fact finding process."[263] An earlier analysis of the issue had produced a similar approach with slightly more room on the substance side of the boundary· "[A] rule is substantive in this context (a) if it has a nonprocedural purpose, or (b) even if its purposes are entirely procedural, if it is calculated to affect behavior at the planning as distinguished from the disputative stage of activity "[264]

Some rules, perhaps even most, serve multiple purposes and for that reason are difficult to classify under this or any other standard. "[I]t is usually possible to discern a dominant purpose [underlying such rules],"[265] says Dudley, and it is their dominant purpose that should govern classification decisions:

> Scholars have traditionally treated rules of evidence whose *primary objective* is to enhance the accuracy of the fact-finding process as fundamentally procedural in character. By contrast, evidentiary rules that *predominantly* serve other goals . . . have been viewed as substantive, even though some of the goals they serve are directly related to the litigation process.[266]

One can easily conclude, as did Dudley, that the dominant purpose of a substantial majority of the provisions of evidence codes "is the enhancement of accuracy in fact-finding."[267] It is good to know that the rules are "mostly procedural," so long as one understands that among the many are at least some that embody policies that are designed to accomplish objectives that have nothing to do with the search for truth in litigation. Indeed, some operate to impede accuracy in fact-finding.

C. *"Mostly Procedural"*

1. *Introduction*

Kentucky's Rules of Evidence are substantially similar to the Federal Rules. It has been said, and is undoubtedly true, that the dominant purpose of a majority of the Federal Rules "is the enhancement of accuracy in fact-

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[263] *Id.* at 1797

[264] Olin Guy Welborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV 371, 404 (1977).

[265] Dudley, *supra* note 251, at 1807

[266] *Id.* at 1797 (emphasis added).

[267] *Id.* at 1807

finding."[268] It is safe to say, as we have so often been told,[269] that the bulk of our evidence rules are indeed procedural, fall within the exclusive rulemaking authority of the Kentucky Supreme Court, and may not be amended by independent action of the General Assembly

2. *Hearsay*

The rules on hearsay easily comprise the biggest and most significant part of evidence law They guard the gate against unreliable proof and are designed "to achieve a more effective and truthful result in the litigation process."[270] They are not intended to affect conduct outside the courtroom and entail no public policy that is extrinsic to fact-finding accuracy There is a consensus among commentators that hearsay rules are "procedure" rather than "substance"[271] and consistent support for that position exists in the case law,[272] although litigation of the classification issue has not been extensive. In *Drumm v. Commonwealth*,[273] a statute creating a hearsay exception for statements by child abuse victims was struck down as "an unconstitutional exercise of judicial rule-making power by the General Assembly,"[274] a decision that makes it easy to conclude that K.R.E. 1102 gives the General Assembly no authority to act on its own to modify the hearsay provisions of Rules 801 through 806.

3. *Witnesses*

The provisions of Article VI of Kentucky's Rules, under the heading "witnesses," cover a range of subjects related to the production of

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[268] *Id.*

[269] *See, e.g.*, Joiner, *supra* note 197, at 435; Giannelli, *supra* note 5, at 41, Thomas F Green, Jr., *Drafting Uniform Federal Rules of Evidence*, 52 CORNELL L.Q. 177, 206 (1967); Joiner & Miller, *supra* note 79, at 651, Jack B. Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV 353, 361 (1969).

[270] Weinstein, *supra* note 269, at 361.

[271] Harold Korn, *Continuing Effect of State Rules of Evidence in the Federal Courts*, 48 F.R.D. 65, 73 (1969); Degnan, *supra* note 252, at 346; Riedl, *supra* note 57, at 605; Weinstein, *supra* note 269, at 362.

[272] *See, e.g.*, Ricciardi v Children's Hosp. Med. Ctr., 811 F.2d 18 (1st Cir. 1987); Croom v Fiedler, 341 F.2d 909 (6th Cir. 1965); New York Life Ins. Co. v. Schlatter, 203 F.2d 184 (5th Cir. 1953).

[273] Drumm v Commonwealth, 783 S.W.2d 380 (Ky. 1990).

[274] *Id.* at 382.

testimonial evidence—testimonial qualifications, impeachment and rehabilitation, cross-examination of witnesses, and others. They are designed to ensure the production of minimally reliable evidence, to facilitate judgments about the credibility of witnesses, and to promote an orderly production of evidence through witnesses. There may be societal objectives in a few of the rules that extend beyond the orderly dispatch of judicial business but none that would be paramount over their obvious pursuit of accuracy in the resolution of factual issues.[275] Courts have classified rules of this nature as "procedure"[276] and commentators have concurred;[277] Kentucky's case law is thin in the area but generally supportive of this conclusion.[278] The provisions of Article VI, Rules 601 through 615, are procedural in the purest sense, and it is hard to see any basis for a conclusion that the General Assembly can act on its own to amend them.

A potentially important classification issue that is affected by Rule 601 needs to be mentioned. It involves the so-called dead man's statutes which operate to preclude survivors of events in litigation from testifying against deceased participants in those events and is well-described in the following statement:

> The Dead Man's statute may be viewed in a variety of ways. It may be placed in the category of a rule designed to better ascertain the truth by discouraging perjury on the part of the survivor. But it may also be viewed as a rule designed to protect the estate of the deceased by placing obstacles in the way of claim prosecutions.[279]

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[275] *See, e.g.*, K.R.E. 610. Rule 610 prohibits the use of evidence of religious beliefs to enhance or impair the credibility of witnesses. Considerations of religious freedom and/or rights of privacy may have been a motivation for the adoption of this rule but would have been less significant than considerations related to the probative value of such evidence and its potential for prejudice to litigants.

[276] *See, e.g.*, Pasternak v. Pan Am. Petroleum Corp., 417 F.2d 1292 (10th Cir. 1969); Poole v. Leone, 374 F.2d 961 (10th Cir. 1967); Erie R. Co. v. Lade, 209 F.2d 948 (6th Cir. 1954).

[277] *See, e.g.*, Dudley, *supra* note 251, at 1807; Riedl, *supra* note 57, at 605; Weinstein, *supra* note 269, at 362.

[278] The most significant case is probably *Gaines v. Commonwealth*, 728 S.W.2d 525 (Ky. 1987). At issue in this case was the constitutionality of a statute allowing children to testify via videotape without findings by the judge and in the absence of an oath. The statute, said the supreme court, "is a legislative interference with the orderly administration of justice." *Id.* at 527

[279] Weinstein, *supra* note 269, at 365.

Rules designed to promote the search for truth are procedure; rules designed to protect the assets of estates are not. Some scholars have said that dead man's statutes are substance,[280] others have said that they are procedure,[281] while still others have put them in the "twilight zone."[282] There was controversy over how to classify them for purposes of the Federal Rules, and the resolution of that controversy made them look more like substance than procedure.[283] Kentucky had a dead man's statute that was used for many decades without any question ever being raised as to whether the General Assembly had authority to enact it into law [284] Its repeal upon the adoption of the Evidence Rules[285] rendered moot the question of whether it must be viewed as substance or procedure, a question that would have to be revisited should the General Assembly ever undertake on its own to revive the statute.

4. *Opinions*

The rules on opinion testimony are contained in the provisions of Article VII, Rules 701 through 706. Rule 701 seeks to ensure an accurate reproduction of events by lay witnesses. Rule 702 is designed to facilitate intelligent evaluation of facts, and the whole Article strives to shield decision makers from unreliable evidence, objectives that caused Judge Weinstein to describe these laws as "truth determining rules."[286] There are no social policies extrinsic to accuracy in fact-finding embodied in the

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[280] *See, e.g.*, Riedl, *supra* note 57, at 604.

[281] *See, e.g.*, Giannelli, *supra* note 5, at 51; Thomas F Green, Jr., *Highlights of the Proposed Federal Rules of Evidence*, 4 GA. L. REV 1, 13 (1969).

[282] Levin & Amsterdam, *supra* note 74, at 22; Weinstein, *supra* note 269, at 365.

[283] The proposed rules that came to Congress from the Supreme Court abolished dead man's statutes. There was hue and cry over this position because it would have foreclosed the applicability of state dead man's statutes in federal cases based on diversity jurisdiction. The role of the substance/procedure distinction in resolving choice-of-laws issues in such cases was discussed earlier; federal courts must apply state "substance" but not state "procedure." Congress rejected the Supreme Court proposal and adopted in its place Federal Rule 601, leaving room for state dead man's statutes in diversity cases and suggesting that, at least for purposes of the Erie Doctrine, such statutes belong in the category of substance.

[284] *See* ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK 355-89 (2d ed. 1984).

[285] *See* Act of Apr. 9, 1992, ch. 324, § 30, 1992 Ky Acts 936.

[286] Weinstein, *supra* note 269, at 361.

opinion rules and no reason to doubt that they must be classified as "procedure" rather than "substance."[287] Rule 1102 gives the General Assembly no authority to act on its own to amend the provisions of Article VII.

5. *Others*

Fact-finding accuracy is the predominant objective of the provisions found in Article I, the general provisions; Article II, judicial notice; Article IX, authentication and identification; and Article X, contents of writings, recordings, and photographs. They are rules of "procedure" for purposes of Rule 1102 and may not be amended by independent actions of the General Assembly

D. *Privileges*

1. *Introduction*

The privileges rules are unique among evidence rules. It has been said that "they cannot properly function as rules of 'mere' evidence,"[288] and, of course, it is obvious that they operate in contradiction to the basic thrusts of the law· "Privileges do not aid in the efficient or accurate disposition of lawsuits. Their rationale rests on a desire to protect and foster certain interests and relationships which 'are regarded as of sufficient social importance' to justify the deliberate suppression of helpful testimony "[289] They serve purposes that are extrinsic to the litigation process and affect private conduct outside the courtroom, both of which make them appear substantive. But they clearly reserve their most important moments for the courtroom and have their most significant effect upon the product of the judicial process, making them look procedural. Are they to be classified as "substance" or "procedure?" This is obviously the question of the moment,

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[287] Although it involves choice-of-laws decisions in federal diversity cases rather than rulemaking power decisions, the most recent case law on classification easily puts the opinion rules in the procedure category. *See, e.g.*, Fox v. Dannenberg, 906 F.2d 1253 (8th Cir. 1990); Salas v. Wang, 846 F.2d 897 (3d Cir. 1988); Dawsey v. Olin Corp., 782 F.2d 1254 (5th Cir. 1986); Scott v. Sears, Roebuck & Co., 789 F.2d 1052 (4th Cir. 1986); Joy Mfg. Co. v Sola Basic Indus., Inc., 697 F.2d 104 (3d Cir. 1982).

[288] Dudley, *supra* note 251, at 1813.

[289] Berger, *supra* note 261, at 421.

made so by acts already taken by the General Assembly against the privilege provisions of the Rules. It is a concrete rather than hypothetical problem and is almost certain to draw the attention of the supreme court sooner rather than later.

2. *Federal Rules*

What to do with privileges provoked an intense fight during the federal reform of evidence law Most of the case law predating adoption of the Federal Rules had classified the law of privileges as "substantive" rather than "procedural,"[290] creating doubt concerning the authority of the Supreme Court to promulgate privileges rules. Commentators were divided over the issue,[291] but the Advisory Committee that had been formed to prepare and propose rules saw more "procedure" than "substance" in privileges: "The appearance of privilege in the case is quite by accident, and its effect is to block off the tribunal from a source of information. Thus its real impact is on the method of proof in the case, and in comparison any substantive aspect appears tenuous."[292] Believing that the authority question had been settled by *Hanna v. Plumer*,[293] the Committee recommended a full set of privileges rules, and the Supreme Court included them in the package that it adopted and transmitted to Congress for approval.[294] The protest aroused by these recommendations almost single-handedly led to rejection of the Supreme Court's package and a substitution of statutes for court rules in the reform of federal evidence law

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[290] *See, e.g.*, Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551 (2d Cir. 1967); Massachusetts Mut. Life Ins. Co. v. Brei, 311 F.2d 463 (2d. Cir. 1962); Palmer v Fisher, 228 F.2d 603 (7th Cir. 1955). *But see* Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960).

[291] *See* Degnan, *supra* note 252, at 346 ("Opinions of highly respectable commentators have differed on this subject."); Green, *supra* note 281, at 10 ("It can hardly be said that privileges may not be rationally categorized as procedural; in fact, Professor E.M. Morgan has suggested that they should be so classified. That opposing views exist merely indicates that either classification is rational.").

[292] Proposed Rules, *supra* note 246, at 233.

[293] Hanna v Plumer, 380 U.S. 460 (1965). "*Hanna* convinced many, including the Advisory Committee that drafted the Rules of Evidence, that all State privileges might be eliminated. Others, however, continued to maintain throughout the congressional debate on the Rules that a federal rule displacing a State privilege would violate the Enabling Act." Berger, *supra* note 261, at 430.

[294] *See* Proposed Rules, *supra* note 246, at 230-61.

It would be somewhat of an understatement to say that critics were unhappy with the content of the privileges proposals,[295] but the loudest objections clearly ran to the fact that privileges law was being formulated under a rulemaking power extending only to matters involving "practice and procedure," i.e., the orderly dispatch of judicial business. "The strenuous objections to the Advisory Committee's treatment of privileges focused primarily on the Committee's refusal to recognize that such rules reflect State interests that transcend considerations based on increasing the accuracy and efficiency of judicial determinations."[296] Congress's final action on the proposals was undoubtedly driven by concerns over the reach of rulemaking authority It abandoned all of the proposed privileges, required federal courts to apply state law on privileges in diversity cases, and provided for the retention of common law principles for use in other cases.[297] These actions would clearly not have been taken without a congressional conclusion that the law of privileges must be classified as "substance" rather than "procedure."

Congress's conclusion that privileges law is substance rather than procedure was drawn in this instance to resolve issues related to the allocation of powers between state and federal governments. It may be more pertinent to the discussion in this Article that the same conclusion was later drawn in connection with an allocation of rulemaking power between the judicial and legislative branches of government.[298] Several years after rejecting court-created rules of evidence law and enacting evidence statutes, Congress amended the Rules Enabling Act and gave the Supreme Court explicit authority to prescribe rules of evidence.[299] In so doing, however, it retained exclusive control over a single area of evidence law by providing that "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by

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[295] The absence of a physician-patient privilege provoked doctors, the narrowness of their privilege provoked the psychotherapists, the absence of a journalist privilege provoked members of the press, and the absence of a privilege for confidential communications between spouses provoked almost everybody

[296] Berger, *supra* note 261, at 439.

[297] *See* FED. R. EVID. 501.

[298] This is not to suggest that substance/procedure determinations for federalism purposes offer no guidance on substance/procedure determinations for rulemaking purposes. In fact, the opposite is probably true as the inquiry in both instances is whether the law being classified involves the orderly dispatch of litigation or some extrinsic policy that extends beyond concerns over the fact-finding accuracy of the judicial process.

[299] *See* 28 U.S.C. § 2074 (1994).

Act of Congress."[300] It has been said, and is certainly accurate, that "Congress singled out privileges for special treatment because it viewed them as substantive."[301]

3. *Scholars*

Classification of privileges rules has not produced consensus among scholars, although everyone concedes that the most compelling case for classifying evidence law as "substance" can be made with respect to the area involving privileges. Some commentators look at the rules, focus on their evidentiary impact, and see somewhat more procedure than substance;[302] others look at the same rules and see extrinsic social policies that are substantially more significant than the procedural effect of such rules.[303] It is perhaps noteworthy that most of those in the first group formed their views before the battle over classification of federal privileges and the developments described in the preceding paragraphs.

Dudley says that privileges are designed to serve substantive objectives and "concern conduct outside the immediate context of litigation."[304] Berger says that they regulate conduct outside the courtroom in order to foster "relationships which 'are regarded as of sufficient importance to justify the deliberate suppression of helpful testimony' "[305] In other words,

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[300] *Id.* § 2074(b).

[301] Giannelli, *supra* note 5, at 44.

[302] *See, e.g.*, Degnan, *supra* note 252, at 347 ("It must be said that even the law of privilege is at least half-procedure, for a truth-seeking interest is being weighed against a truth-obstructing interest. "); Morgan, *supra* note 242, at 484 ("It follows that such a [rulemaking] provision should be interpreted as vesting in the courts the power to make rules of evidence, including those governing competency and privileges of witnesses and privileged communications.").

[303] *See, e.g.*, Dudley, *supra* note 251, at 1813 ("Privilege rules are unique, and in a sense they cannot properly function as rules of 'mere' evidence."); Thomas Krattenmaker, *Testimonial Privileges in Federal Court: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 110 (1973).

> These privileges rules are designed to "affect people's conduct at the stage of primary private activity" and therefore should be classified as substantive or quasi-substantive and are "unlike the ordinary rules of practice which refer to the processes of litigation, in that [they affect] private conduct before the litigation arises."

Id. (quoting Massachusetts Mut. Life Ins. Co. v Brei, 311 F.2d 463, 466 (2d Cir. 1962)).

[304] Dudley, *supra* note 251, at 1802.

[305] Berger, *supra* note 261, at 421.

say these scholars and others, the privileges rules push beyond the orderly dispatch of legal business and penetrate well into "areas of basic social and moral policy,"[306] far enough to create a belief among many that decisions concerning such policy should be left to forums that are closer to the public than are courts:

> [P]rivileges are too much a part of the social fabric to be the exclusive preserve of professional expertise. True, they raise problems of legal practice and judicial administration, but also philosophical, psychological and, in the fine sense of the word, political, problems which in a democratic society must at least in the first instance be fought out in legislative halls [307]

A clergyman's privilege exists because of deeply embedded feelings that humans need intimate religious counseling and advice; spousal privileges promote intimacy in marriage relationships and express a "'natural repugnance' for convicting a defendant upon the testimony of his or her 'intimate life partner.'"[308] It is very difficult to argue that these are decisions that ought to be rendered by public servants who are elected to facilitate the search for truth in the courtroom.

4. *Conclusion*

The word "bad" belongs in any evaluative judgment of what the General Assembly has done to the privileges provisions of the Evidence Rules. No privilege is ever warranted unless the injury that would result from requiring testimony would be greater than the damage to the judicial process from the loss of important information.[309] Probably none of the privileges added to the Rules by the General Assembly could survive careful scrutiny under this standard.[310] This, however, is completely beside the point, for this inquiry examines the authority of the General Assembly to act and not the wisdom of its actions.

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[306] Degnan, *supra* note 252, at 347

[307] David W Louisell & Byron M. Crippin, Jr., *Evidentiary Privileges*, 40 MINN. L. REV 413, 414 (1956).

[308] Giannelli, *supra* note 5, at 52-53 (footnote omitted).

[309] *See* JOHN WIGMORE, EVIDENCE AT TRIALS AT COMMON LAW 527 (McNaughton rev. 1961).

[310] It has been said and is true that most privileges "exist principally because of the activities of pressure groups." Green, *supra* note 281, at 16. It is almost a certainty that the ones under discussion owe their existence solely to the interests of those who obtained the privileges.

The General Assembly has exercised authority over privileges rules for at least several decades. The statutes on the books when Kentucky undertook to reform its evidence law included provisions on spousal privileges,[311] the attorney-client privilege,[312] religious privilege,[313] the psychiatrist-patient privilege,[314] and some lesser known privileges.[315] No doubt was ever expressed before their repeal concerning their legitimacy, although the supreme court had much earlier laid claim to exclusive authority over matters of "practice and procedure." It might be quite a stretch to conclude from these circumstances that the court has conceded that privileges rules are substance rather than procedure. It is not insignificant, however, that the court has had hundreds of opportunities to claim exclusive authority over privileges and has never made even a slight movement in that direction.

In separating evidence law into substance and procedure, the best scholars draw a distinction between rules that predominantly foster accuracy in fact-finding and rules that predominantly foster other objectives. They classify the latter as substantive and place privileges in that category It is interesting, in light of these conclusions, to revisit the supreme court's only opinion on this subject since the adoption of the Evidence Rules. The issue in *Mullins v. Commonwealth*,[316] as more fully discussed above, was whether the legislature had intruded upon the rulemaking powers of the court by enacting a statute that removed from the protection of the spousal privileges provision of the Rules testimony about child sexual abuse. In sustaining the validity of the statute, the court seemed to recognize a most substantial role for the General Assembly in the definition of evidentiary privileges: "The General Assembly may legislate in order to protect children, and it may determine that children's rights are paramount when there is a conflict with the privilege of an adult to exclude evidence regarding the abuse, dependency or neglect of a child."[317] The court does not say in so many words where privileges belong in the substance/procedure dichotomy, but its decision and observations seem to chart a course toward the position that is described in the first part of this paragraph. Should it get to that destination, the court would

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[311] *See* K.R.S. § 421.210(1) (repealed 1992).

[312] *See id.* § 421.210(4).

[313] *See id.*

[314] *See id.* § 421.215 (repealed 1992).

[315] *See, e.g., id.* § 421.2151 (sexual assault counselor privilege); *id.* § 421. 216 (school counselor-student privilege) (repealed 1992).

[316] Mullins v Commonwealth, 956 S.W.2d 210 (Ky. 1997).

[317] *Id.* at 212.

conclude that the provisions in Article V, Rules 501 through 511, may be amended by independent actions of the General Assembly

E. Relevancy and Related Subjects

1. *Introduction*

No one would contend that the fundamental rules of relevancy are anything but pure procedure. There is no purpose other than fact-finding accuracy in the relevancy requirement, the definition of relevant evidence, and the provision authorizing the exclusion of such evidence when it threatens the reliability of judicial decisions.[318] The rules on character, including provisions on other crimes, wrongs, or acts, are designed to address recurring relevancy problems, promote no purposes other than accuracy in the judicial process, and should be treated as "practice and procedure" for purposes of Rule 1102. Beyond these provisions of Article IV, Rules 401 through 405, rests the area of evidence law that is the second most likely, behind the law of privileges, to harbor rules of substance.

2. *Subsequent Remedial Measures*

Rule 407, which prohibits the use of subsequent remedial measures to prove that an injury-causing act was negligent, is one of several provisions in Article IV that serves multiple purposes. It seeks to promote fact-finding accuracy by excluding evidence thought to have low probative value and high potential for prejudice, seeks to avert injury and harm to others by encouraging corrective measures, and thus is both procedural and substantive.[319] It is unsurprising that this classification has produced disagreement and conflicting decisions.

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[318] Rule 402 imposes the relevancy requirement, Rule 401 defines relevant evidence, and Rule 403 authorizes exclusion to protect the reliability of the process from prejudice, confusion, waste of time, etc. The first two are patently procedural and the third is close: "[M]ost discretionary exclusions under the doctrine embodied in rule 403 are based upon what Wigmore called auxiliary probative policy. The purpose of the exclusion is to ensure more accurate factfinding, not to promote some extrinsic policy Therefore, such rulings are normally classifiable as procedural for all purposes." Wellborn, *supra* note 264, at 394-95.

[319] Of the purposes underlying Rule 407, the concern that the evidence may be irrelevant, highly prejudicial, or confusing can be considered procedural because it deals with fairness in the litigation process. The other purpose of Rule 407 is to promote the social policy of fostering repairs. This reflects a policy choice extrinsic to the lawsuit.

Lev Dassin, *Design Defects in the Rules Enabling Act: The Misapplication of Federal Rule of Evidence 407 to Strict Liability*, 65 N.Y.U. L. REV 736, 778 (1990).

The classification issue has surfaced most often as a choice-of-laws question in federal diversity cases. Should the provision be viewed as procedure, allowing federal law to apply, or should it be viewed as substance, requiring the use of state law? Everyone puts the provision in the "borderland where procedure and substance are interwoven"[320] and finds classification difficult. A majority of the federal courts which have considered the question see the rule as sufficiently based on procedural considerations to be classified as procedure,[321] while a strong minority believes that the provision is too substantive to be classified as procedure.[322] Commentators are far more consistent in their views than the federal courts and seem almost universally to see the provision "as part of the fabric of substantive law."[323]

K.R.E. 407 is borrowed from the Federal Rules. Drafters of those Rules spoke very clearly about the paramount purpose for excluding evidence of subsequent remedial measures:

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[320] Flaminio v. Honda Motor Co., 733 F.2d 463, 471 (7th Cir. 1984).

[321] *See, e.g.*, Wood v. Morbark Indus., 70 F.3d 1201 (11th Cir. 1995); Cameron v. Otto Bock Orthopedic Indus., 43 F.3d 14 (1st Cir. 1994); Kelly v. Crown Equip. Co., 970 F.2d 1273 (3d Cir. 1992).

> [T]he substantive judgment that underlies Rule 407 is entwined with procedural considerations. It is only because juries are believed to overreact to evidence of subsequent remedial measures that the admissibility of such evidence could deter defendants from taking such measures. Congress's judgment that juries are apt to give too much weight to such evidence is a procedural judgment that is, a judgment concerning procedures designed to enhance accuracy or reduce expense in the adjudicative process.

Flaminio, 733 F.2d at 471 (citation omitted).

[322] *See, e.g.*, Wheeler v. John Deere Co., 862 F.2d 1404 (10th Cir. 1988); Oberst v. International Harvester Co., 640 F.2d 863 (7th Cir. 1980). "The purpose of Rule 407 is not to seek the truth or to expedite trial proceedings; rather, in our view, it is one designed to promote state policy in a substantive law area." Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir.), *cert. denied*, 469 U.S. 853 (1984).

[323] 2 CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, FEDERAL EVIDENCE 73 (2d ed. 1994). *See also* Dassin, *supra* note 319, at 738-39 ("Since Rule 407's primary purpose is to encourage safety improvements by defendants, the Rule affects social behavior extrinsic to lawsuits. Therefore, Rule 407 should be characterized as substantive "); Weinstein, *supra* note 269, at 370 ("The third category of evidence rules includes those designed to achieve independent substantive impact. In many instances the extrinsic policy has been tagged as a rule of relevance, as in the case of exclusion of post-accident repairs offered to show negligence.") (footnote omitted).

> The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. (2) The other, *and more impressive,* ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.[324]

The "more impressive" ground for the provision, its "paramount purpose," is a nonprocedural purpose. If "paramount purpose" is to be the keystone in classifying rules that intermingle substance and procedure, as it must be, then there can be no real doubt about the proper classification of Rule 407 It should be classified as "substance" for purposes of Rule 1102, which would mean that it is subject to amendment by independent actions of the General Assembly

3. *Offers of Compromise*

Rule 408 is another provision that is designed to serve multiple purposes. It promotes accuracy in fact-finding by excluding evidence that is often weak in probative value and always burdened with a great potential for prejudice. It has been said, however, that "[a] more consistently impressive ground [for the provision] is promotion of the public policy favoring the compromise and settlement of disputes."[325] Because Rule 408 acts as a kind of privilege for communications made during settlement negotiations and is calculated to encourage conduct outside the courtroom, it has the characteristics of substantive law It has been identified by commentators as a rule that might be classified as substance but has drawn no firm commitment to that position,[326] probably because it involves a matter that is fundamental to the quality of justice in the courtroom. The thin case law that can be found on the issue suggests that courts are likely to classify the rule as procedure.[327] Is the judiciary or the legislature better suited for decision making on this subject? It is believed that the answer to this crucial inquiry is obvious and that the proper classification of Rule 408 is procedure rather than substance.

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[324] FED. R. EVID. 407 advisory committee's note (emphasis added). *See also* STUDY COMM., *supra* note 6, at 30 ("As stated by the drafters of the Federal Rules, this second ground for excluding the evidence is 'more impressive.'").

[325] FED. R. EVID. 408 advisory committee's note.

[326] *See, e.g.*, Korn, *supra* note 271, at 74-75; Dudley, *supra* note 251, at 1800; Giannelli, *supra* note 5, at 55-57

[327] *See* Morris v. LTV Corp., 725 F.2d 1024 (5th Cir. 1984).

4. *Rape Shield*

Rule 412, the so-called rape shield law, serves primarily to limit evidence of the sexual predisposition and prior sexual conduct of alleged victims of sexual assault. The prototype for rape shield laws, which exist in most if not all jurisdictions, first appeared on the scene in order to alter common law rules that authorized the use of evidence of an alleged rape victim's moral character. Whether the aim was to eliminate the use of irrelevant evidence or to protect the privacy interests of rape victims was at least somewhat unclear, although the best bet might be that it was a blend of the two.

Rule 412 is patterned after an earlier version of Federal Rule 412. The history of the provision strongly indicates that its main objective was nonprocedural—"to prevent the victim, rather than the defendant, from being put on trial."[328] Most authorities on the Federal Rules would concur with the following description of its goals:

> Rule 412 aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule is designed to encourage victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.[329]

If there is a fact-finding purpose underlying the provision, it is surely outweighed by the twin objectives of protecting privacy and encouraging prosecution of offenders.

Kentucky had a rape shield statute before it had a rape shield provision in the Evidence Rules.[330] The supreme court construed the statute on several occasions without any expression of doubt about the authority of the legislature to act in this area. The court of appeals spoke explicitly on this subject as well as on the purpose of the statute: "We believe the statute is a valid exercise by the legislature of this Commonwealth to prevent the victim in a sexually related crime from becoming the defendant at a

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[328] JOSEPH MCLAUGHLIN, WEINSTEIN'S FEDERAL EVIDENCE 412-19 (2d ed. 1999).

[329] MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 477 (4th ed. 1996).

[330] *See* K.R.S. § 510.145 (repealed 1992).

trial."[331] It would be very hard for the supreme court to ignore this history and claim exclusive control of rape shield protection. The primary purposes of the rule push into areas of social and moral policy and beyond the technical expertise of the judiciary Rule 412 clearly belongs on the substance side of the dichotomy

5. *Others*

Rule 409 excludes evidence of a defendant's payment of the plaintiff's medical and similar expenses; it is designed to leave room for humanitarian assistance to injured persons but is more heavily based on doubts about relevance.[332] Rule 411 excludes evidence of liability insurance when offered to prove negligence or other wrongful conduct. It eliminates what might be a disincentive to the acquisition of insurance coverage but is more clearly based on concerns about probative value and prejudice. Rule 410 excludes evidence of plea bargaining and plea agreements and is based on the same considerations that underlie Rule 408's exclusion of offers of compromise. The supreme court is unlikely to find the extrinsic policies fostered by these provisions to be superior to considerations related to accuracy in fact-finding and is unlikely to permit the General Assembly to amend them under the authority of Rule 1102.

F Presumptions

Presumptions are burden of proof rules that have nothing to do with the admission or exclusion of evidence. Some serve primarily, if not exclusively, to facilitate the search for truth and look mostly "procedural;"[333] others are closely connected to substantive rights and clearly look more "substantive."[334] Federal courts have usually classified presumptions as "substance" for *Erie Railroad* purposes, requiring the application of state

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[331] Smith v. Commonwealth, 566 S.W.2d 181, 183 (Ky. Ct. App. 1978).

[332] *See* Fields v. Rutledge, 284 S.W.2d 659 (Ky. 1955).

[333] An example of a presumption that serves no purpose other than accuracy in fact-finding is the presumption that a properly addressed and mailed letter was received in due course by the addressee.

[334] The presumption against suicide that operates to favor beneficiaries over insurers is an example of a presumption that pursues policies other than fact-finding accuracy, namely favoring one potential litigant over another by imposing the burden of proof on the latter.

presumptions law in diversity cases;[335] the Federal Rules of Evidence adopt this same position.[336] Commentators have been more discriminating in classifying presumptions, although clearly recognizing that some if not most belong on the substantive side of the distinction.[337]

There are only two provisions on presumptions in the Kentucky Rules of Evidence. Rule 301 provides that presumptions operate in civil cases to shift the burden of going forward with evidence but not the risk of nonpersuasion ("when not otherwise provided for by statute"). Rule 302 provides that presumptions related to facts governed by the law of other jurisdictions shall be governed by the presumptions law of that jurisdiction. The first blends procedure and substance, regulating the effects of presumptions at trial but authorizing the General Assembly to provide for different effects by statute; it acknowledges the substantive nature of presumptions law and would seem clearly to qualify as a rule that is subject to legislative modification under Rule 1102. Rule 302 is a choice-of-laws provision that belongs on the substance side of the dichotomy and that is clearly subject to change by independent action of the General Assembly

V CONCLUSION

The drafters of Kentucky's Evidence Rules sought to facilitate amendment of the Rules through cooperative efforts of the supreme court and General Assembly, similar to the efforts that had produced enactment of the Rules in the first place. The plan was to reduce the importance of the boundary separating judicial and legislative authority over evidence law by giving the supreme court authority to initiate modification of the Rules and the General Assembly an adequate opportunity to review modifications implicating compelling matters of public policy They found a model for the plan in the provisions that presently govern amendment of the Federal Rules of Evidence.[338]

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[335] In *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959), the leading authority, the Supreme Court said that "[u]nder the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive' " *Id.* at 446. The Court had earlier classified burden of proof rules as substantive for purposes of *Erie Railroad. See, e.g.*, Palmer v Hoffman, 318 U.S. 109, *reh'g denied*, 318 U.S. 800 (1943); Cities Serv. Oil Co. v Dunlap, 308 U.S. 208 (1939).

[336] *See* FED. R. EVID. 302.

[337] *See, e.g.*, Ronan Degnan, *The Law of Federal Evidence Reform*, 76 HARV L. REV 275, 283 (1962); Ely, *supra* note 151, at 723; Levin & Amsterdam, *supra* note 74, at 18; Weinstein, *supra* note 269, at 363-64.

[338] *See* 28 U.S.C. §§ 2072-2074 (1994).

Rule 1102 allocates to the supreme court a lion's share of the responsibility for amendment of the Rules by authorizing the court to prescribe amendments to any provisions of the Rules (even those that might be classified as substance rather than procedure). It requires that amendments be transmitted to the General Assembly for review but authorizes the General Assembly to reject and/or modify them only when they extend beyond the court's constitutional power over practice and procedure. It was expected that experiences with this approach would parallel those of the federal system, with the General Assembly having very little interest in modification of the Rules, routinely deferring to the judgment of the court, and rarely taking actions to generate issues over whether the authority to act should rest with the court or General Assembly Unfortunately, the amendment process has not functioned as anticipated, and we have no way of knowing if it would or would not have worked as planned.

The problem, simply described, is that the supreme court has shown no interest in the Evidence Rules since their 1992 enactment. It has prescribed no amendments under the provisions of Rule 1102 and has done nothing to suggest that it might do so at some future point, although amendments are currently needed. More tellingly, the court has failed to activate a component of the amendment process that is crucial to its success—the Evidence Rules Review Commission that was specifically created to work with the supreme court and General Assembly on necessary modifications of the Rules.[339]

The Evidence Rules Review Commission was designed to replicate federal rules advisory committees that have worked effectively in guiding the United States Supreme Court through necessary reform of federal court rules. It includes members from both the legislative and judicial branches but was deliberately designed to be closer to the court than to the General Assembly;[340] the chief justice serves as chair, appoints six of its eight members, and holds exclusive authority to call the Commission for meetings. It was expected to monitor the operation of the Rules, participate in amendment activities in both the court and General Assembly, and stand as a barrier to modifications that would weaken the Rules. In fact, it has done nothing. It did not exist at all for the first five years after enactment

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[339] Rule 1103 defines the composition of the Commission and its role, and Rule 1102 ties the work of the Commission to the amendment process.

[340] It has two members from the judiciary (including the chief justice), two members from the General Assembly (the chairs of the House and Senate Judiciary Committees), and five members from the practicing bar. *See* K.R.E. 1103(a).

of the Rules, awaiting the chief justice's appointment of members,[341] and has yet to hold its inaugural meeting, which can only be called by the chief justice.

One of the lessons of rulemaking history is that courts may be slow to exercise rulemaking powers, even when the need to do so is obvious to all. Another of the lessons of this history is that legislatures will quickly move into rulemaking vacuums left by the judiciary What we have seen since the enactment of the Evidence Rules is a repeat of this history The supreme court has been slow to exercise its responsibilities under Rules 1102 and 1103, and the General Assembly has moved aggressively against what it apparently believes to be deficiencies in the Rules. Why the court has shown so little interest in the Rules since their enactment is unclear if not mysterious, since the Rules were far more the work of the court than the General Assembly What it has done by manifesting such indifference to the Rules is quite consequential.

Without participation by the supreme court, amendment of the Rules must adhere to the constitutional separation of judicial and legislative authority over evidence law Even under the very best of circumstances, "[i]t must be recognized that there are areas in which it is not clear whether the legislature or the judiciary should establish the necessary rules."[342] The boundary that divides this authority is profoundly blurred by a murky mixture of policy and procedural considerations in evidence rules, and by decades, maybe even centuries, of shared responsibility for the formulation of the law Drafters hoped to maneuver around this condition by forging a working partnership between the supreme court and General Assembly, a hope crushed by the court's failure to perform critical obligations under Rule 1103. It has put the Evidence Rules Review Commission out of commission and will surely inherit from these actions difficult litigation over whether the General Assembly has acted beyond its authority in amending the Rules.

In addition to this development, of course, there is the damage that has been inflicted upon the Rules by acts of the General Assembly—the addition of totally unwarranted privileges that lie in wait for an opportunity to impair the search for truth in an important case. There is less reason for worry about this damage, which is slight, than about the weaknesses of the amendment process that permitted it to occur. The General Assembly acted

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[341] *See* Letter from Robert F Stephens, Chief Justice, to Robert G. Lawson (Apr. 3, 1997) (on file with author).

[342] Joiner & Miller, *supra* note 79, at 629.

in these instances without hearing a word from the judiciary about the deleterious effects of these privileges upon the search for truth in litigation. Drafters of the Rules believed it important for the General Assembly to hear from the court before acting on evidence issues, and they structured an amendment process to enable the Evidence Rules Review Commission to accomplish this objective. The court has not taken the actions needed to give the process a fair test. Unless that happens, it is highly probable that the General Assembly will move well beyond the privileges area and pose a far greater threat to the integrity and efficiency of the Rules than we have seen so far.